

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 FOR THE COUNTY OF YAVAPAI

2011 DEC 29 AM 8:29

SANDRA K HAFKHAM, CLERK

Stephanie Kling

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY THIRTY-THREE

APRIL 20, 2011

Camp Verde, Arizona

ORIGINAL

REPORTED BY
 MINA G. HUNT
 AZ CR NO. 50619
 CA CSR NO. 8335

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2 FOR THE COUNTY OF YAVAPAI

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4 STATE OF ARIZONA,)
5 Plaintiff,)
6 vs) Case No V1300CR201080049
7 JAMES ARTHUR RAY,)
8 Defendant)
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1 Proceedings had before the Honorable
2 WARREN R. DARROW, Judge, taken on Wednesday,
3 April 20, 2011, at Yavapai County Superior Court,
4 Division Pro Tem B, 2840 North Commonwealth Drive,
5 Camp Verde, Arizona, before Mina G. Hunt, Certified
6 Reporter within and for the State of Arizona.
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PROCEEDINGS

THE COURT: The record will show the presence of the defendant, Mr. Ray; the attorneys. The jury is not present.

Ms. Polk, Ms. Rybar indicated you had an issue you wanted to take up before we started.

MS. POLK: Yes, Your Honor. Thank you. Yesterday afternoon the state received a motion or a memorandum filed by defense called "Defendant, James Arthur Ray's Bench Memorandum Regarding Angel Valley Unrelated Business Taxable Income."

This morning the Court had provided to counsel copies of various rulings that you have issued. I believe that you have addressed the issue raised in this memorandum. And this memorandum specifically seems to continue to address the issue of whether or not the tax status of the Hamiltons can be raised.

What I wanted to clarify for Court and counsel is that, as set forth in the complaint by Angel Valley against James Arthur Ray and James Ray International, that the Hamiltons have a church called "Angel Valley Ministries." It's an Arizona nonprofit corporation. Then they also have Angel Valley Spiritual Retreat Center, which is an LLC,

an Arizona limited liability company. And it's a for-profit company. It's this company that runs the retreat center, and it is a for-profit business.

The ministry is separate from that. And it's the ministry that has the church status, that my reading under the IRS code is as a church. They don't even have to file the 990.

I believe the issue remains the same. But the facts have changed because clearly the Angel Valley Spiritual Retreat Center, as a limited liability company, is a taxable entity. They have been paying their taxes. They have been filing the 1040. That is not public information.

And I wanted to clarify the facts for the Court. And I also wanted to make sure that the memorandum filed this morning did not change the Court's ruling.

THE COURT: I haven't been able to see the memorandum because of the technical problem going on with imaging.

Mr. Li.

MR. LI: I assumed that the Court had. We filed a pleading yesterday. I think the Court had asked us to address that issue. So we addressed

it, set forth the various tax codes and why we believe we had a good-faith basis to ask the questions and not conduct a minitrial.

THE COURT: Well, I'll certainly see that before either of the Hamiltons testify. I think with regard to Ms. Mercer, I just don't see why there would be questioning in that area.

Mr. Kelly.

MR. KELLY: There will not be.

THE COURT: Okay. So I will be able to see that at noon and go over that and see if that changes the initial ruling I had.

MR. LI: And just to clarify, Your Honor, having read the Court's ruling, the only thing we -- we want to ask the questions. We're not asking for a prove up. We understand under Rule 608 the extrinsic evidence is not admissible. So we are just asking the questions we think it's a good-faith basis to ask those questions. And that's what we set out on or brief.

THE COURT: Any questions -- it's agreed upon that the Mercers -- that would be extrinsic evidence, in any event, somebody else's knowledge if they had it.

Ms. Polk.

MS. POLK: And, Judge, that's why I wanted to clarify the facts. The defense has the facts wrong. It is not Angel Valley Ministries that runs the retreat center. Angel Valley Ministries is the church. They are exempt. They don't even have to file the 990, under my reading of the IRS codes.

But it is a for-profit business, which is Angel Valley Retreat Center, LLC, that runs the retreat center. They are for profit. They have been filing their taxes. And the contracts between JRI and Mr. Ray is with Angel Valley Retreat Center, the business that the Hamilton runs on that property.

Factually, the defense has it wrong. To allow any sort of questions suggesting somehow that Angel Valley Ministries is the one who is running the retreat center or illicitly profiting from the retreat center is just factually wrong.

MR. LI: Your Honor, that's what the state says. But I think we have a good-faith basis to ask the questions. And, moreover, I would just point out, I think Ms. Polk on last week, Thursday last week, suggested that there was no evidence indicating that there was any problem with the IRS with Angel Valley.

1 I was looking through various zoning
2 documents over the weekend and saw that they had
3 been audited by the IRS for precisely these kinds
4 of issues. I'm not sure Ms. Polk has the corporate
5 structure of Angel Valley really correct. But
6 that's why we get to ask these questions.

7 MS. POLK: Your Honor, this is exactly what
8 404(b) is about, is that not in front of the jury
9 the factual basis for these issues would be proven
10 by the parties. But for Mr. Li to come here in
11 court this morning and say they have a good-faith
12 basis to start asking questions that would attack
13 the character of the Hamiltons without establishing
14 outside of the presence of the jury in the 404(b)
15 context, first of all, the factual basis, so the
16 Court could make finding by clear and convincing
17 evidence -- but, secondly, what the purpose under
18 404(b) would be to attack the Hamiltons on this
19 collateral issue.

20 The rules are clear that you don't attack
21 witnesses based on character. And the exceptions
22 are set out in 404(b). And none of that has been
23 properly followed by the defense.

24 THE COURT: I'll read the pleading, of course.
25 I did mention that I see similarities with going

1 into Holotropic Breathwork and Samurai Game, having
2 subtrials on issues, is just something that should
3 not happen. But I need to read your response.

4 MR. LI: Thank you, Your Honor.

5 THE COURT: And then a couple of other things
6 I want to say that would have to do with -- one
7 with the Hamiltons, the other just the civil
8 lawsuits.

9 And looking at that issue -- I will go
10 ahead with the written ruling to let the parties
11 know where I stand on that. At this point I just
12 don't see the fact of settlement would be
13 admissible. I think it would just by implication
14 show liability -- well, what it would do by
15 implication is indicate culpability by recognizing
16 a claim or something like that. It doesn't come
17 directly within 408.

18 I really think 408 controls. And unless
19 the state has specific authority to the contrary,
20 evidence of settlement would not be admissible.
21 However, when the matter gets pressed -- and I
22 think it got pressed very far last time in terms of
23 what was in the lawsuit.

24 And yes. A complaint is in some form a
25 statement just by definition. It can contain

1 hearsay. It can be a nonhearsay statement relating
2 to possible motive and bias. It can be a lot of
3 things.

4 But when things are taken so far, I can't
5 say that there isn't a situation where it might end
6 up being pertinent evidence. I don't know. But
7 based on law now, it's not admissible -- the law
8 that I have.

9 The other question that was brought up
10 that had to do with the Hamiltons specifically was
11 the Daniel P. incident. And what I have to say at
12 this time is that the state's basis for arguing
13 admissibility was dealt with in the 404(b) hearing.
14 That's not an appropriate basis for admissibility.
15 So that's what I'm saying about that at this time.

16 Is there anything else before we get
17 started, Ms. Polk?

18 MS. POLK: Your Honor, I'm not clear on what
19 you just said regarding the Daniel Pfankuch
20 incident. I understand that it's not admissible as
21 a 404(b) act. But on the issue of causation, I do
22 believe the Court has ruled. And I believe I
23 understand the Court's ruling in that regard.

24 THE COURT: I looked through the argument that
25 you presented last Thursday, Ms. Polk. And it was,

1 again, arguing, essentially, a prior bad act kind
2 of argument, using heat recklessly, that kind of
3 thing. And that was the basis you argued,
4 essentially, I believe.

5 MS. POLK: I'm drawing a blank as to what was
6 argued last Friday. But, Your Honor, the state has
7 consistently argued that on this issue of causation
8 that -- as to what caused the deaths of the
9 victims, what happened in prior sweat lodge
10 ceremonies, both with Mr. Ray facilitating them and
11 others facilitating them, is relevant to
12 establishing what happened in 2009.

13 THE COURT: And there has been abundant
14 evidence, hours of evidence presented, as it turns
15 out. And part of that is the defense went into
16 that. And it was understandable because of my
17 ruling. But there has already been a lot of
18 testimony on that point with prior sweat lodges.

19 But I thought I heard you argue again,
20 essentially, the proof of knowledge and
21 recklessness -- I thought that was the argument you
22 were presenting last Thursday. That's not an
23 appropriate purpose. And it gives me a great deal
24 of concern if it's going to be presented in that
25 fashion.

1 There could well be relevance to that in
2 some respect. But I've talked in the past about if
3 something is, basically, intrinsic, those things.
4 But the matter in which it's being urged, I see it
5 opening up, again, kind of a minitrial. We've been
6 using that word. But an additional trial aspect
7 probably with the Hamiltons involving a great deal
8 of hearsay.

9 So I just -- at this point for the
10 purpose it's been advanced -- and you're saying --
11 now you're really saying for causation.

12 MS. POLK: And, Judge, that's all we've ever
13 argued. We had -- in the 404(b) context we had
14 argued other relevance. But since that's the
15 Court's ruling, we have consistently argued that
16 information about what happens at Angel Valley
17 during sweat lodge ceremonies is relevant to the
18 issue of causation. And that's the argument we
19 advanced last week as well.

20 The jury has heard only from three
21 witnesses on the issue of causation and the prior
22 sweat lodges. And that's from Debby and Ted Mercer
23 and then just briefly Jennifer Haley. And the jury
24 has only heard about 2007 and 2008.

25 What is also relevant is what happens in

1 2005, again, when it is Mr. Ray who is conducting
2 the sweat lodge ceremony and somebody falls ill.
3 So it is directly relevant to the issue of
4 causation and his claim that in 2009 when people
5 fall ill, it's related to something other than
6 something he caused.

7 What happens in 2005 when he runs a hot
8 sweat lodge ceremony is relevant to the issue of
9 causation, just as what happens in 2007 and 2008 is
10 relevant, and just as what happens when it's not
11 Mr. Ray who is conducting a ceremony, both in the
12 structure used in 2009 and in other structures not
13 used in -- similar to what happened in 2009.

14 For all those reasons, that all goes to
15 causation. The jury has heard about 2007. 2008
16 they've only heard from three witnesses. And what
17 happened in 2005 remains directly relevant to the
18 issue of causation.

19 THE COURT: Actually, I think, Mr. Li, you
20 were addressing this on Thursday.

21 Mr. Kelly, you addressed a certain aspect
22 of it with regard to Melinda Martin and opening the
23 door. I recall you addressing that. I believe
24 Mr. Li did have the argument.

25 MR. LI: There is a couple of points here that

1 we need to make. Your Honor, we will be filing
2 shortly the pleading that the Court had asked us
3 to -- the simultaneous briefing on the 404(b) issue
4 in general relating to prior acts.

5 The problem with the state's proffer is
6 that it's premise and -- the problem with the
7 state's proffer and the basis upon which the Court
8 made its decision relating to the causation --
9 admissibility of prior acts relating to causation
10 is that it's premised on three points, all of which
11 have now turned out to be untrue.

12 The first point is that from a medical
13 perspective that a doctor would care about -- would
14 find relevant what happened in some event four
15 years prior with different people in a different
16 sweat lodge and other things. I think the Court
17 noticed that issue and asked exactly that. This is
18 all in our pleading. We'll get it to you. We
19 don't want to take up too much of your time.

20 But the fact that the Court needs to be
21 aware of is that yesterday and the day before,
22 under the Court's ruling that we could interview
23 the medical expert, Dr. Mosley, up in Flagstaff --
24 who examined one of the decedents, he said,
25 essentially, that it would be dangerous, quote,

1 unquote, to extrapolate anything about the cause of
2 death in 2009 based on evidence of what may have
3 happened at prior sweat lodge ceremonies in that he
4 would not -- he explicitly said he would not
5 consider such factors in the determination of his
6 cause of death in 2009.

7 So just from a pure medical perspective,
8 the state's own witness has said that it would be
9 dangerous to try to extrapolate that. So that the
10 medical underpinnings of -- the representations
11 that the state has made to this Court and upon
12 which this Court has made its rulings have just
13 proven to be false by their own witness.

14 We have quoted an extensive amount of the
15 discussion. And you will see that it's very clear,
16 that the question was posed very clearly, and that
17 the medical examiner rejected that.

18 And the actual inquiry that Ms. Do posed
19 to Dr. Mosley was 2005. And the doctor says what
20 he said. And you'll see it in the pleading.

21 The second proffer is that it didn't
22 matter what the materials or structures of the
23 various sweat lodges were. Well, the Haddow report
24 actually says different. The Haddow report says
25 you know what. Actually there are a lot of factors

1 that go into the construction of the sweat lodge
2 and that these are contributing factors. And we
3 didn't know about that. And we only found out
4 about that because of the state's late disclosure.
5 I don't want to take up --

6 THE COURT: No. That's okay. I need to see
7 that.

8 I need to hear from Ms. Polk, though, now
9 if you have fundamental disagreement with what
10 Mr. Li has recited so far about Mr. Haddow.

11 MS. POLK: Your Honor, yes. And the state
12 will be filing our response today as well. But
13 clearly what Mr. Haddow had to say in the interview
14 makes what happens in other sweat lodge ceremonies,
15 as well as Mr. Ray's prior sweat lodge ceremonies,
16 even more relevant.

17 Mr. Haddow doesn't say that there is
18 something inherently defective with the sweat
19 lodge. Mr. Haddow says really what is the obvious.
20 If you contain a group of people inside a
21 relatively airtight structure, that they will be
22 exhaling carbon dioxide and carbon dioxide will
23 build up inside that structure. That's obvious,
24 and that's what Mr. Haddow says.

25 So it doesn't matter that it is these

1 particular covers and the size of the sweat lodge
2 used in 2009. It could be in a different location.
3 It could be different covers. If you contain
4 people inside an enclosed area even without
5 introducing heat, carbon dioxide will build up.

6 And so it is deceptive to suggest that
7 Mr. Haddow said that there was something inherently
8 wrong with the materials of this sweat lodge
9 ceremony. In fact, what Mr. Haddow says is that
10 there were no volatiles. His belief is that it's
11 the breath. It's the exhaling of participants that
12 causes the buildup of carbon dioxide.

13 He specifically says that he does not
14 find that any volatiles were somehow released
15 because of the heat by the tarps. He does not find
16 that anything was introduced, for example, from the
17 rocks that were burned in a wood pile and then
18 brought inside the sweat lodge. There is no
19 outside source of carbon dioxide. The carbon
20 dioxide is from the participants inside an enclosed
21 area.

22 MR. LI: Your Honor, first of all, I would
23 appreciate -- I've been trying to abide by the
24 Court's rulings and not personalize things. And I
25 understood the Court's conversation to me earlier

1 about when I said it was aggressively unrepentant.
2 And the Court corrected me, and I tried to cease
3 that line of argument.

4 I would ask that the Court also apply the
5 same rules to the state. We're not being
6 deceptive. We have it in a brief. We have exactly
7 the notes that are being referenced in our brief.
8 The Court will have ample opportunity to see what
9 we're arguing.

10 I note, just for the record, that in the
11 state's pleadings in response to the mistrial
12 motion, essentially, it just said that the defense
13 is lying. It said that we are breaching our duty
14 of candor to the Court. And that doesn't -- we
15 don't do that. What we did was we actually laid
16 out what the facts were.

17 And so I would just ask that if we're
18 going to be -- I'm making my best effort at being
19 civil about these kinds of things. I ask the state
20 do the same.

21 But with respect to the Haddow report,
22 there are -- and it's in our briefs, Your Honor.
23 We received from the state reams of paperwork from
24 Mr. Haddow in which he laid out his various -- the
25 various factors that he would consider in

1 determining whether or not -- what caused the air
2 quality to go bad. He didn't -- for the record, he
3 did not test any of the tarps. He doesn't know
4 whether the tarps were giving off any fumes or not.
5 But I just want to correct that thing.

6 Among the factors that he included were
7 the number of people per session, the amount of
8 water, heat and rocks -- this is just taken
9 directly from his notes. Heat from rocks and size
10 of rocks. Those are consistent with what
11 Ms. Polk's -- material and construction of the
12 lodge is one of the factors.

13 This is right from his notes. You know,
14 other pollutants, offgassing of formaldehyde from
15 the plastic tarps, pooling height of the CO2,
16 position of the people, human breath, air exchange
17 potential. That means -- you know -- how airtight
18 it was. And a number of other factors that are all
19 in our papers here that the Court can review and
20 look at and determine that, in fact, there are a
21 lot of factors that go into Mr. Haddow's
22 analysis -- factors that we were unaware of because
23 the state never disclosed it.

24 THE COURT: Ms. Polk.

25 MS. POLK: Your Honor, I just want to clarify

1 that the defense received nothing from us. The
2 only thing we ever received from Mr. Haddow was
3 that unsolicited email where he said to us some
4 preliminary opinions. The defense received
5 directly from Mr. Haddow reams of paper, not from
6 us. And it was provided to us as well.

7 What I want to clarify is the state --
8 the defense had represented to the Court in the
9 motion for mistrial that the state had retained
10 Mr. Haddow. Mr. Haddow made that clear to the
11 defense in the interview that we never retained
12 him, that he sent us this email and it was
13 unsolicited by us.

14 He made no bones about the fact that he
15 was trying to get hired by the state. And he told
16 the defense specifically about the contacts where
17 he was trying to get hired by the state and again
18 confirmed that the email was unsolicited and that
19 the state had never retained him. And that was
20 represented to the Court in the motion for
21 mistrial.

22 MR. LI: Your Honor, we will be filing the
23 brief shortly that lays out all of the contacts
24 that Mr. Haddow had with the state that we have
25 been made aware of since this Court's ruling on

1 Thursday.

2 Those contacts start -- the state is
3 representing to this Court that these were
4 unsolicited, that this email was unsolicited on
5 April 29, 2010.

6 The contacts -- and the Court will have
7 this on the record in writing, including exhibits
8 that support all of the statements I'm about to
9 make. The contacts with the state begin -- and by
10 "state," I mean any employee of the state, meaning
11 Detective Diskin.

12 So they start with Detective Diskin on
13 October 20, 2009. That's 12 days after the
14 accident. Now, if the Court goes back and reads
15 the papers that the state filed, the state says in
16 its papers that the first time they had any contact
17 with Mr. Haddow was right before the indictment.

18 THE COURT: Mr. Li, in terms of getting the
19 trial started, I don't need a full account of this
20 right now. I'll look at the filings.

21 Here's what I'm saying about 404(b) right
22 now: I don't think this is going to come up with
23 Ms. Mercer.

24 Mr. Kelly.

25 MR. KELLY: Judge, I was about to address a

1 somewhat different issue. It's related obviously.
2 What I recall and what I was about to say is that
3 the Court directed us to file simultaneous briefs.

4 THE COURT: What I said is I wanted Mr. Hughes
5 to file the response on the time. And if you
6 wanted to file something in addition, you could.
7 That's what I indicated.

8 MR. KELLY: And that's been filed by the
9 defense today, as articulated by Mr. Li.

10 Here's my question for the Court, or
11 concern I need to put on the record, is that I am
12 conducting the cross-examination of Ms. Mercer.
13 She spent a great deal of her direct testimony
14 speaking of the -- her experiences during the
15 incidents in 2007 and 2008.

16 And in 2008 there are numerous exhibits
17 admitted into evidence by both parties. We're of
18 the opinion -- and we thank you for the break to
19 allow us to continue the investigation as it
20 relates to the Brady information and directly the
21 interviews of Haddow and Mosley.

22 And after those interviews, we're of the
23 opinion that at this juncture the prior sweat lodge
24 incidents, any comparison with other sweat lodges,
25 simply should not have been admitted at this trial.

1 Now, that needs to be argued. And I'm
2 not the person that's arguing. It's Ms. Polk and
3 Mr. Li. But from a trial attorney standpoint --
4 who is just getting ready to cross-examine the
5 witness, I want the record clear that we believe
6 that the those prior incidents should not have ever
7 been mentioned in the case in chief against my
8 client, Mr. Ray.

9 That I'm now in the untenable position on
10 cross-examination to explain to this jury this
11 witness's -- other facts about this witness's
12 recollection in 2007 and 2008. And I do so without
13 waiver of any of the arguments advanced by Mr. Li.

14 And my biggest concern from a due-process
15 standpoint is that I believe this bell has been
16 rung by the state. I believe it was erroneous to
17 do so. And my cross-examination is going to
18 emphasize the ringing of the bell. And I believe
19 that creates further prejudice to my client.

20 And, again, Judge, I'm looking to the
21 Court for direction. But I would anticipate -- I
22 have my cross-examination outlined. And I would
23 anticipate just offhand that we're probably talking
24 about two hours, maybe two and a half hours,
25 relating to '07 and '08 just to clarify

1 misconceptions presented on direct. And we have
2 requested last -- I think it was Thursday,
3 Wednesday or Thursday last week. We requested some
4 jury instructions -- we presented them to the
5 Court -- in regards to admissibility of this
6 other-act evidence.

7 So, Judge, I'm just explaining the
8 difficulty that the defense has at this point. And
9 then we're not talking about the legal intricacies
10 argued by Ms. Polk and Mr. Li now, simply from a
11 trial attorney's perspective and what this jury is
12 understanding as to what's happening in this
13 courtroom. And we all know as experienced trial
14 lawyers that cautionary instructions don't unring
15 the bell.

16 MR. LI: Your Honor, so the defense's position
17 is clear, we are taking the position, and it's in
18 our pleadings, that this Court's ruling was based
19 on certain avowals by the state about the relevance
20 of the information and why it should come in.

21 And we believe that the Haddow report and
22 our recent interview with Dr. Mosley -- and it's in
23 our report in which Dr. Mosley said it would be
24 dangerous to make any comparisons -- try to use
25 some prior incident to make a comparison to the

1 present incident. It would be dangerous to do
2 that.

3 We believe that those underpinnings,
4 those avowals, that the state made to this Court
5 and that this Court based -- upon which this Court
6 based it's rulings -- those avowals have proven to
7 be untrue. And so, as a consequence, that's the
8 basis for our request to have all the prior
9 testimony about the sweat lodges stricken and any
10 future testimony about prior sweat lodges excluded.

11 The Court will have our briefing on this.
12 But we feel this is a very important issue. And
13 recent developments have revealed a lot of
14 information that's contained in our brief.

15 So we thank the Court for the opportunity
16 to brief that issue.

17 THE COURT: Ms. Polk, I want to address just
18 Ms. Mercer at this point so we can get restarted
19 here. And if you have anything about Mr. Kelly's
20 point before I indicate my intention.

21 MS. POLK: Your Honor, I'm not clear what
22 Mr. Kelly is saying that he -- what his
23 cross-examination would be based on. Obviously any
24 questions posed by Mr. Kelly, this witness needs to
25 have that personal knowledge of. They need to be

1 questions posed in good faith. And Mr. Kelly has
2 to be in a position where he is willing to prove up
3 the information. If the -- it's just not clear to
4 me what Mr. Kelly is referencing.

5 MR. KELLY: I can attempt again, Judge. It's
6 very simple. We believe that all the testimony
7 relating to prior sweat lodges or comparison to
8 sweat lodges, now based on our discovery during the
9 last four days, must be stricken by this Court.

10 In that regard, I am just about to begin
11 to cross-examine a witness. And this improper door
12 has been opened, in our opinion. And I want the
13 record to be clear that we're not -- I am not
14 waiving any argument that is set forth in those
15 briefs. And I've expressed difficulty as an
16 experienced trial attorney in going into those
17 areas. And yet, I guess we're in a tenuous
18 position.

19 I have to -- I can't let it sit there
20 until you rule on our motions. That's what I was
21 attempting to articulate. I don't want the record
22 to show any type of waiver of the requests which
23 have been filed or are contained in the briefs
24 which are filed this morning.

25 And I'm just articulating to the Court

1 that from a due-process standpoint, this is very
2 difficult to now emphasize -- we've had a week
3 break, and I am going to go back in and explain
4 2007 and 2008 in response to the direct
5 examination.

6 THE COURT: There is a distinction that you
7 made with regard to Mr. Mercer's testimony where I
8 think you indicated, Mr. Kelly, you made a point of
9 not going back and talking about other sweat lodges
10 that Mr. Ray was not involved in.

11 Do you recall that?

12 MR. KELLY: I do, Judge.

13 THE COURT: And so, there again -- and I see a
14 distinction also. And I haven't seen anything from
15 Mr. Haddow other than that email, essentially. But
16 the -- any evidence with regard to sweat lodges
17 that Mr. Ray was involved in, I've indicated I did
18 not find prejudice to the extent it was consistent
19 with other evidence that has come in from
20 statements. I know there were objections to that
21 also initially. But at least in that respect I've
22 noted that.

23 The comparison raises another question
24 that I can certainly see where the Haddow opinion
25 and reports could bear on that. So you made the

1 record on that, Mr. Kelly. You have. You've done
2 that. It is on the record.

3 I'm saying in general, my view is that I
4 don't believe it's necessary, in any event, to have
5 additional prior sweat lodge testimony offered for
6 the purpose it has been offered through two
7 witnesses predominantly but three including
8 Ms. Haley. I've mentioned before I can see a
9 rebuttal type situation arising perhaps.

10 So I want to make that clear because
11 there was talk today about Ms. Polk was saying only
12 three witnesses have testified. If it's,
13 essentially, cumulative, and it turns out not to be
14 contested in certain respects, there is no sense
15 that I see or don't know -- That's the right word.
16 There is no reason to have just multiple witnesses
17 going over that information. And right now there
18 is a question about it, in any event.

19 Ms. Polk.

20 MS. POLK: Your Honor, I understand the
21 cumulative objection. But the more the defense
22 challenges causation, the more relevant what
23 happens on other occasions in that same structure
24 and in other structures becomes relevant. The more
25 the defense challenges causation, the more they

1 challenge that it was the heat and Mr. Ray's
2 conduct that caused the death of the victims, the
3 more it becomes relevant what happens in that same
4 structure with other groups of people and what
5 happens when it is Mr. Ray at Angel Valley
6 conducting the ceremonies. That goes directly to
7 the issue of causation.

8 The more the defense tries to suggest it
9 wasn't Mr. Ray's conduct, it was something outside
10 of his control, it wasn't the heat, it was the
11 structure of this sweat lodge that caused their
12 death and not Mr. Ray's conduct, then the more
13 relevant it is for the jury to see that in October
14 of 2008 a group of 50 people participated in a
15 sweat lodge ceremony in that same structure a month
16 after Mr. Ray conducted a ceremony.

17 He conducted his in September of 2008
18 with many people getting sick. October of 2008 a
19 group of 50 people participated in a ceremony in
20 that same structure, that same frame, the same
21 coverings, the same brown cover, and nobody got
22 sick.

23 So the more the defense challenges that
24 it's something outside of Mr. Ray's control that
25 caused people to die, the more relevant it becomes

1 to look at what happens in that same structure when
2 other people are facilitating, and to look at
3 Mr. Ray's conduct when he conducts ceremonies over
4 the years and people get sick.

5 Causation is the issue. The defense is
6 challenging causation. And this evidence about
7 what happens on other occasions in different
8 structures, on other occasions in the same
9 structure, on other ceremonies facilitated by other
10 pourers -- it all becomes relevant.

11 THE COURT: And I have, I think, an avowal
12 from the defense that says an expert who studies
13 these things indicates that's not something that
14 can be done.

15 MR. KELLY: Judge, I apologize.

16 THE COURT: That's what I'm hearing. And I
17 haven't seen the report. So I'm hearing two
18 different versions now of what people are telling
19 me this report says.

20 MR. KELLY: May I approach, Judge?

21 THE COURT: Not just yet, Mr. Kelly.

22 Ms. Polk, what was wrong with my premise?

23 MS. POLK: I don't believe I've heard the
24 defense make that avowal, what the Court said.
25 That was news to me.

1 MR. KELLY: Judge, I will approach. I can
2 show you the excerpt from the transcript. It's
3 contained in the pleading. It's word for word. It
4 outlines what Mr. Li was saying.

5 THE COURT: So that Ms. Polk knows what I'm
6 looking at, would you describe this, please.

7 MR. KELLY: It's page 4 of the simultaneous
8 brief. The transcript is attached to the Court's
9 document.

10 MS. POLK: Your Honor, the defense has not
11 provided us with a transcript. They have not
12 provided us with this pleading.

13 MR. LI: Mr. Hughes was on the telephone.

14 THE COURT: We have the record to continue
15 with Ms. Mercer's testimony. I'll look at this
16 when Ms. Polk has been provided a copy.

17 And then just anything else
18 administratively? We can continue with this
19 witness now.

20 Mr. Kelly.

21 MR. KELLY: Judge, in response to Ms. Polk, I
22 believe her argument is that somehow we're supposed
23 to concede the cause of death or not
24 cross-examination witnesses on material facts.

25 Given Dr. Mosley, who says as a medical

1 fact you cannot extrapolate prior sweat lodges with
2 the cause of death in 2009. It's the state's
3 witness. They were present. It was conducted
4 yesterday afternoon.

5 We're not trying to surprise anyone.
6 We're wondering how is it the government can stand
7 up and then accuse me somehow of opening the door
8 to cause of death during cross-examination on prior
9 sweat lodges that should have never been mentioned
10 in the first place.

11 THE COURT: You've made a record. You're
12 going into this because it's the position you're in
13 now.

14 MR. KELLY: Correct.

15 THE COURT: And that's clear.

16 I'm not going to look at that, Ms. Polk,
17 until you have a chance to see it. I want to have
18 the information presented to me where I can look at
19 what both sides have to offer. And then we will
20 start here in a few minutes.

21 Thank you.

22 (Proceedings continued in the presence of
23 jury.)

24 THE COURT: The record will show the presence
25 of the defendant, Mr. Ray; the attorneys, and the

1 jury.

2 Good morning, ladies and gentlemen. And
3 Ms. Polk is ready to continue with direct
4 examination of Ms. Mercer, who should be entering
5 the courtroom momentarily.

6 Ms. Mercer, if you would please come
7 forward to my right and take the witness stand. Of
8 course, you're still under oath. You know that?

9 You're nodding yes. Okay.

10 THE WITNESS: Yes.

11 THE COURT: Ms. Polk.

12 MS. POLK: Thank you.

13 DIRECT EXAMINATION (Continued)

14 BY MS. POLK:

15 Q. Good morning, Ms. Mercer.

16 A. **Good morning.**

17 Q. When we left off, we had just played the
18 9-1-1 call. Do you recall that?

19 A. **Yes.**

20 Q. Prior to you calling the 9-1-1 call,
21 making the 9-1-1 call, you had told the jury about
22 some things that you heard inside the sweat lodge.

23 Do you recall that testimony?

24 A. **Yes, I do.**

25 Q. Is there something that you wanted to

1 clarify for the jury that you testified about last
2 week or the week before?

3 A. **Yes, I do.**

4 Q. And specifically it pertains to something
5 you heard?

6 A. **Yes.**

7 Q. What round was it that you heard
8 something?

9 A. **The seventh round.**

10 Q. And where were you when you heard it?

11 A. **Outside the door.**

12 Q. And was it during the round?

13 A. **It was when the door was open.**

14 Q. And where were you when you heard that?

15 A. **At the door.**

16 Q. Where was Mr. Ray?

17 A. **Right inside the door.**

18 Q. Where were participants when you heard
19 something?

20 A. **In the sweat lodge, in the back of the
21 sweat lodge.**

22 Q. And tell the jury what you heard.

23 A. **I heard somebody say that so-and-so are
24 unconscious.**

25 **And James said, really. They're not**

1 **breathing? They're unconscious?**

2 **And they said, no. I can't get them to
3 react or respond.**

4 Q. You just used the word "so-and-so"?

5 A. **I couldn't hear their names. If I heard
6 them, I don't remember. I didn't recognize them at
7 the time or anything.**

8 Q. And do you recall whether it was a male
9 or a female voice that spoke out that so-and-so was
10 unconscious?

11 A. **It was a male voice. And I just wanted
12 to clarify that initially they said, unconscious.
13 And I believe I said the other day, not breathing.
14 And I'm sorry. I was having a hot flash at the
15 moment. My mind went blank. I really apologize.
16 And I looked at my statement from the police, and
17 that is what he said. Unconscious.**

18 Q. Thank you. When you left to call 9-1-1,
19 where was Mr. Ray?

20 A. **Sitting in the side of the sweat lodge in
21 the -- under the tarp.**

22 Q. I'm going to put up on the overhead
23 Exhibit 508 and ask you if you -- first of all, do
24 you recognize that? It's hard to see with the
25 glare.

1 **A. It looks like it's inside the tarp where**
 2 **he would have been sitting.**
 3 **Q. In one of those chairs?**
 4 **A. Yes.**
 5 **Q. After you made the 9-1-1 calls that we**
 6 **heard --**
 7 **A. Yes.**
 8 **Q. First of all, let me back up. You**
 9 **mentioned a conversation you had with a nurse,**
 10 **someone who you believed was a nurse?**
 11 **A. Yes. After I had pulled out the female**
 12 **and the one male and was screaming for help,**
 13 **somebody that had came up who I thought it was the**
 14 **nurse looked at her. And she said, she's not**
 15 **breathing.**
 16 **And I said, I know.**
 17 **And she said, what do we do?**
 18 **And my husband said, call an ambulance.**
 19 **And she said, find Megan. Where is**
 20 **Megan?**
 21 **Do I keep going?**
 22 **Q. Yes.**
 23 **A. And then I looked around, and I couldn't**
 24 **see Megan. And that's when I went over to where**
 25 **James Ray was sitting. And then I went up to him**

1 **and said, there is three people not breathing. We**
 2 **need to call an ambulance. Where is Megan?**
 3 **And he shrugged his shoulders like, I**
 4 **don't know. And I was standing there in a panic**
 5 **saying, we need to call an ambulance.**
 6 **And he just said, I don't know. And**
 7 **then --**
 8 **Q. Did Mr. Ray get up and go over to the**
 9 **people?**
 10 **A. No.**
 11 **Q. And when you left to call 9-1-1, did you**
 12 **see Mr. Ray?**
 13 **A. I believe he was still sitting in the**
 14 **chair.**
 15 **Q. We heard the 9-1-1 calls, Ms. Mercer.**
 16 **And there were three calls, I believe, placed by**
 17 **you?**
 18 **A. Yes.**
 19 **Q. Tell the jury where the first call was**
 20 **made from.**
 21 **A. I ran to my house -- I got in the golf**
 22 **cart and went to the house. And I couldn't find**
 23 **the phone at first. I ran up and down the stairs.**
 24 **And that's when I made the first call. And then I**
 25 **found the cell phone and took that with me back to**

1 **the sweat lodge area.**
 2 **Q. I'm going to put back up on the overhead**
 3 **Exhibit 140. Kind of a glare on it today. After**
 4 **you made that first 9-1-1 call, where did you go?**
 5 **A. Back to the sweat lodge area.**
 6 **Q. And tell the jury what you observed at**
 7 **that time.**
 8 **A. Well, as I was driving up, I saw James**
 9 **Ray standing outside of the sweat lodge circle area**
 10 **on a cell phone. And I drove over to tell Ted that**
 11 **the ambulance was on the way.**
 12 **Q. And then how long did you spend at the**
 13 **site?**
 14 **A. A few minutes. Because I knew I could**
 15 **see -- 9-1-1 told me to go to the gate. I could**
 16 **see if the ambulance was coming from down the hill.**
 17 **So I waited until I saw the ambulance start to**
 18 **come, and then I went to the gate.**
 19 **Q. From the sweat lodge site you can see the**
 20 **road?**
 21 **A. Yes.**
 22 **Q. And can you tell the jury approximately**
 23 **how long it takes to drive the road from the**
 24 **highway down into Angel Valley.**
 25 **A. Depending on your vehicle, but at least**

1 **10 to 15 minutes.**
 2 **Q. Is it paved?**
 3 **A. No. It's a forest service road. It's**
 4 **really bumpy, lots of holes.**
 5 **Q. When you then went to the gate -- do you**
 6 **see the gate on this map?**
 7 **A. Not really. I mean, it's not marked.**
 8 **It's before -- it's before the water.**
 9 **Q. Did you meet, then, the emergency**
 10 **responders?**
 11 **A. Yes.**
 12 **Q. Do you recall what sort of emergency**
 13 **responder arrived first?**
 14 **A. I believe it was a fire truck.**
 15 **Q. And at some point you made additional**
 16 **phone calls to 9-1-1?**
 17 **A. Yeah. I made another one when I was on**
 18 **the way from the sweat lodge to the gate. I**
 19 **made it, like, right around this area to make**
 20 **sure -- well, actually on the way back there I made**
 21 **another one before I went back to the -- right when**
 22 **I was getting there to make sure they knew to send**
 23 **more than one ambulance. And then on the way to**
 24 **the gate I called to let them know another guy was**
 25 **burned.**

1 Q. Was burned?

2 A. **Uh-huh.**

3 Q. Do you recall approximately how long you

4 waited for the first emergency responder to arrive?

5 A. **20 minutes.**

6 Q. And then once you met the first emergency

7 responder, what did you do?

8 A. **He followed me in the golf cart back to**

9 **the sweat lodge area.**

10 Q. Did you direct him to somebody in

11 particular?

12 A. **To the people that weren't breathing.**

13 Q. And where were those people at that time?

14 A. **To the back of the sweat lodge where we**

15 **pulled them out.**

16 Q. And I want to ask you a couple questions

17 about Mr. Ray. At your position at the door during

18 Mr. Ray's ceremony, did you have an opportunity to

19 observe his condition?

20 A. **Yes.**

21 Q. And tell the jury what you observed.

22 A. **He maintained consciousness or -- you**

23 **know -- was always talking, always alert. He was**

24 **in control of the lodge and always talking. He**

25 **told me when to open the door, when to close it.**

1 **He often had his hand in the bucket. I would put**

2 **the bucket of water in. He would often have his**

3 **hand in the bucket of water. He laid down at one**

4 **point. He sat up. But he was coherent,**

5 **functioning.**

6 MR. KELLY: Objection to the word "coherent."

7 THE WITNESS: He was talking to me.

8 THE COURT: Overruled. The answer will stand.

9 Q. BY MS. POLK: Did Mr. Ray talk to you

10 throughout the entire length of the ceremony?

11 A. **Yes. Myself and my daughter.**

12 Q. You said Mr. Ray had his hand in the

13 bucket of water. Did you see what he did with the

14 water when he put his hand in?

15 A. **You know -- splash himself with the**

16 **water.**

17 Q. Did you ever see Mr. Ray provide water in

18 that fashion to anybody else inside the sweat

19 lodge?

20 A. **No.**

21 Q. When the ceremony ended, how did you know

22 to open the door?

23 A. **He calls for the door to be opened.**

24 Q. Mr. Ray called for the door to be opened?

25 A. **Yes. Mr. Ray calls for the door to be**

1 **opened.**

2 Q. Did you observe whether Mr. Ray had

3 anything to eat from the comfort station that had

4 the fruit?

5 A. **I don't know.**

6 Q. Did you observe whether he had anything

7 to drink?

8 A. **I saw him drink something when he came**

9 **out of the sweat lodge. Yes.**

10 Q. Do you recall what sort of vessel he was

11 drinking from?

12 A. **No. I want to say a water bottle. I**

13 **don't think it was a glass. It was a bottle.**

14 Q. Okay. And did you ever observe whether

15 Mr. Ray appeared to suffer any sort of distress or

16 illness after his ceremony?

17 A. **To me it didn't appear so.**

18 Q. During the time, then, that the emergency

19 first responders have now arrived at the scene,

20 what were you doing?

21 A. **Well, after the first one came, at first**

22 **I didn't know what to do. I was standing there.**

23 **James was standing over here. I heard him tell**

24 **anyone who could to get to their room or to help**

25 **people get to their rooms, which I thought was**

1 **unusual because the ambulances were just now**

2 **coming. Help was coming, and he told them to go to**

3 **their rooms.**

4 Q. By "James," you mean Mr. Ray?

5 A. **James Ray. He was standing outside of**

6 **the sweat lodge area again.**

7 Q. And let me stop you there. When you say

8 "standing outside of the sweat lodge area," I'm

9 going to put up on the overhead Exhibit 145. Tell

10 us what you mean.

11 A. **Well, there is what they call a "sacred**

12 **circle." You can't really see it. But there is a**

13 **ring of rocks. If you were father away, you would**

14 **see a ring of rocks -- you know -- defining that**

15 **area. And that's what they call the "sacred space"**

16 **in the area. And he was outside of there both**

17 **times that -- well, two times that I saw him he was**

18 **outside of that area.**

19 Q. I'm going to put up Exhibit 229.

20 A. **It's still hard to tell. But --**

21 Q. Do you see the sweat lodge in that

22 photograph?

23 A. **Yes, I do.**

24 Q. Will you point it out to the jury.

25 And the comfort station.

1 And can you give us a general idea of
2 where the ring is that you've been referring to.
3 **A. The people that you see are standing**
4 **inside the ring. These here. But this bucket here**
5 **is outside of the ring. The golf cart is outside**
6 **the ring. So it goes around, and it goes around**
7 **the back as well. But it's a ring of rocks. And**
8 **then that's where that log is as well. But it's a**
9 **ring of rocks around it.**

10 **Q.** And how many minutes after the arrival of
11 the emergency responders did you hear Mr. Ray make
12 that statement?

13 **A. It was right when they came. Within**
14 **minutes. And he was standing right about here**
15 **both -- well, the first time when I came back, he**
16 **was here. And then the second time he was about**
17 **here. And that's when he told people to go to**
18 **their rooms.**

19 **Q.** What did you hear him say?

20 **A. I heard him say, anyone who can, get to**
21 **your room. Or if you can help anyone else, get**
22 **them to their rooms.**

23 **Q.** What sort of voice did Mr. Ray use?

24 **A. A normal voice. He wasn't yelling or**
25 **demanding. It was more an order.**

1 **Q.** An order?

2 **A. An order. You know. Anyone get to your**
3 **rooms.**

4 **Q.** Did you see --

5 **A. He wasn't asking nicely. It was --**

6 MR. KELLY: Your Honor, I'm going to object,
7 to strike the answer.

8 THE COURT: Sustained.

9 **Q.** BY MS. POLK: Did you see anybody -- in
10 response to Mr. Ray's statement did you see anybody
11 get up?

12 **A. Yes.**

13 **Q.** Tell the jury what you saw.

14 **A. I saw people helping one lady in**
15 **particular that I was concerned about get into a**
16 **golf cart and drive away with her. And I was**
17 **concerned about --**

18 **Q.** Who -- do you recall the lady you were
19 concerned about?

20 **A. She was -- no. I don't know her name.**
21 **She was really large. I remember -- this is bad.**
22 **But when she came, I remember hoping that she could**
23 **walk out of the sweat lodge at the end. I didn't**
24 **want to have to pull her out.**

25 **And then at the end she was one that was**

1 **pulled out and didn't know who she was. My husband**
2 **and someone else were talking to her, and she was**
3 **not talking coherently. And her eyes were rolling,**
4 **and shivering. Yeah. And they put her in a golf**
5 **cart and were going to take her to her room.**

6 **Q.** Did you see who put her in a golf cart?

7 **A. I don't know. I think my daughter was**
8 **with them.**

9 **Q.** Did she actually -- was she actually
10 taken away in a golf cart?

11 **A. I believe she was. But I think they**
12 **brought her back. I know she was seen by EMTs.**

13 **Q.** Did you see other people leave the area
14 after Mr. Ray made that statement?

15 **A. Yes.**

16 **Q.** About how many people would you say left
17 the area?

18 **A. I saw 10 to 12 people leave the area and**
19 **go to their rooms.**

20 **Q.** Do you recall how many people left on
21 their own as opposed to being helped into a golf
22 cart?

23 **A. I'd say three left in golf carts, and the**
24 **others walked with somebody. I don't remember**
25 **anyone walking alone but -- you know -- I kind of**

1 **watched it happen and was helping take care of the**
2 **people that were still there in need of help.**

3 **Q.** What was your reaction to that statement
4 from Mr. Ray that people should leave the area?

5 **A. I was surprised and disagreed because I**
6 **was relieved --**

7 MR. KELLY: Your Honor, object based on
8 relevance.

9 THE COURT: Overruled.

10 THE WITNESS: The ambulance has just gotten
11 there and help are had arrived. And I was relieved
12 help was there. And I didn't think people should
13 be leaving because I thought they should be looked
14 at, in my opinion.

15 **Q.** BY MS. POLK: Did you help anybody leave
16 the area?

17 **A. No. I didn't help them -- well, I helped**
18 **them leave the area by carrying them to a**
19 **helicopter and carrying to an ambulance but not**
20 **taking them to their rooms.**

21 **Q.** And tell the jury what you did in terms
22 of helping people get to the ambulances and to the
23 helicopter.

24 **A. I helped carry, I think it was, the third**
25 **fellow that we pulled out. I'm not sure. I helped**

1 carry him to one of the helicopters. There was,
2 like, four -- there is ambulances and fire trucks
3 all the way up that driveway. And the helicopters
4 were in an area further away.

5 And we carried that cart. I thought it
6 was on wheels, but it wasn't. And we carried it
7 all the way a long distance to that helicopter.

8 And then --

9 Q. Do you recall who else was helping carry
10 that particular --

11 A. Ted helped me. And I don't know who else
12 was there. I think the rest were medical people.

13 Q. Did you observe where Mr. Ray was?

14 A. I don't know where he was at that point.
15 I did see him one other time, though.

16 MR. KELLY: Your Honor, objection. No
17 question.

18 THE COURT: Sustained.

19 Q. BY MS. POLK: How many other people did
20 you help carry to helicopters, Ms. Mercer?

21 A. I helped carry another lady, one other
22 lady, to another helicopter and another person to
23 an ambulance.

24 Q. Did you know someone named Liz Neuman?

25 A. No.

1 Q. And do you know today who she was?

2 A. Yes.

3 Q. Are you able today to recall whether or
4 not -- to specifically recall Liz Neuman at the
5 scene?

6 A. No. I know -- I don't know if it was
7 her. There was a lady that was on an ambulance --
8 on a stretcher. And she was combative. And they
9 were trying to tie her down, trying to keep her
10 restrained.

11 And I went up to her and started singing
12 to her. And she was telling me how beautiful I was
13 and that I was an angel and describing my wings to
14 me. I think that was her, but I don't know.

15 Q. Did you know someone named Sidney
16 Spencer?

17 A. No.

18 Q. And did you know someone named Tess Wong?

19 A. No.

20 Q. You had testified when we were here last,
21 Ms. Mercer, about the person that James Shore had
22 dragged to the entrance of the sweat lodge just
23 before the final round?

24 A. Yes.

25 Q. Do you have any recollection of that

1 person and what happened to that person after

2 Mr. Shore left that person at the entrance?

3 A. No, I don't. That wasn't the only person
4 that came out at that point. There was other
5 people.

6 MR. KELLY: Your Honor, objection. Asked and
7 answered.

8 THE COURT: Sustained.

9 Q. BY MS. POLK: You had testified about the
10 man who burned himself. Do you recall what his
11 name was? Did you ever know his name?

12 A. No.

13 Q. Did you become aware of that man who had
14 burned himself around the time that the emergency
15 responders were there?

16 A. Yes.

17 Q. And tell the jury what you remember.

18 A. I remember that they had put him in the
19 back of an ambulance. I saw him -- you know -- put
20 him in the back of an ambulance. A few minutes
21 later I saw him walking around.

22 Q. You saw the man with the burned arm
23 walking around?

24 A. Yes. I went up to him and said, you got
25 to sit in the ambulance. You got to go. They need

1 to take care of you.

2 And he said, I can't. No. I can't.

3 I said, yes. They need to take care of
4 you. You need to go there.

5 And he got real close to me, and he said,
6 I can't. I don't have any underwear on.

7 MR. KELLY: Your Honor, objection. Move to
8 strike. Relevance, 403.

9 THE COURT: Overruled.

10 THE WITNESS: He was really concerned and
11 would not get in the ambulance because of that.
12 And --

13 Q. BY MS. POLK: Because of his statement
14 that he thought he didn't have underwear on?

15 A. Yes.

16 Q. What did you observe about his condition
17 at that time?

18 A. He was not --

19 MR. KELLY: Your Honor, objection. Lack of
20 foundation, asking for a medical conclusion.

21 THE COURT: As long as it's phrased in terms
22 of 602. So just as to form.

23 Q. BY MS. POLK: In terms of your
24 observations, what did you observe about the man
25 with the burned arm?

1 **A. He appeared to be not in his right mind.**
 2 **He didn't make sense. What he was saying for the**
 3 **situation did not appear to make sense. He didn't**
 4 **seemed to be concerned for his safety at that**
 5 **moment. He was concerned over something that**
 6 **didn't matter.**

7 MR. KELLY: Your Honor, object. Ask the
 8 entire answer be stricken. Lack of foundation.

9 THE COURT: What had to do with speculation as
 10 to what he might be thinking -- that portion is
 11 stricken. Just that portion.

12 Ms. Polk.

13 **Q. BY MS. POLK. Did you do something for**
 14 **that man at that time? You talked about talking to**
 15 **him. Did you do something more for him?**

16 **A. I assisted him back into the ambulance.**

17 **Q. How did you get him back in the**
 18 **ambulance?**

19 **A. I held his hand and talked to him nicely**
 20 **like a child and asked him to sit there. And a**
 21 **paramedic then came and took him from me and stayed**
 22 **with him.**

23 **Q. What else did you do, Ms. Mercer, at that**
 24 **scene?**

25 **A. I helped whoever I could. Once the EMTs**

1 **started showing up, I tried to stay out the way.**
 2 **And that's when I started just picking up some of**
 3 **their garbage. Because -- you know -- they opened**
 4 **stuff. And so I was trying to pick up some of**
 5 **that. And then that's when I saw the lady on the**
 6 **stretcher and went and talked to her. And then we**
 7 **just waited because they told us to stay there.**

8 **Q. How long did you stay down at this scene**
 9 **that we see in the overhead?**

10 **A. A really long time it seemed. I don't**
 11 **know the time.**

12 **Q. How were you feeling at that time?**

13 **A. I was cold, tired, hungry. I hadn't**
 14 **eaten all day. We were -- we had steak and shrimp**
 15 **for after the sweat lodge because it was supposed**
 16 **to be over at 5:00. We were going to barbecue**
 17 **after that. So I hadn't eaten, and I was cold.**
 18 **And then we went to my house. And then I really --**
 19 **it's kind of a blur after that. I --**

20 **Q. Do you recall what time it was that you**
 21 **left the scene and went to your house?**

22 **A. No. I remember we stayed and stayed and**
 23 **stayed because they kept telling us we had to talk**
 24 **to the police. And then we asked if we could go to**
 25 **our house instead because we were on the scene**

1 **still. And then they said, yes, we could.**

2 **Q. So who was it that told you you could go**
 3 **to your house?**

4 **A. I don't remember.**

5 **Q. Was it a police officer?**

6 **A. I think a policeman told my husband Ted.**
 7 **Yes.**

8 **Q. I want to ask you a couple questions**
 9 **about the sweat lodge itself. First of all, during**
 10 **that ceremony of October 8, 2009, did you ever**
 11 **touch the tarps that covered the structure?**

12 **A. Yes.**

13 **Q. And on how many occasions? I'm going to**
 14 **put up on the overhead Exhibit 146.**

15 **Did you touch that outside tarp?**

16 **A. Yes.**

17 **Q. Do you recall what it felt like to the**
 18 **touch in terms of temperature?**

19 **A. It wasn't noticeable. It was normal.**

20 **Q. Did it ever feel hot to you?**

21 **A. No.**

22 **Q. Did you touch it throughout the ceremony?**

23 **A. Yes.**

24 **Q. Did it ever feel hot to you?**

25 **A. No.**

1 **Q. The next layer under the brown cover --**
 2 **is that a tarp also?**

3 **A. Yes.**

4 **Q. And do you recall whether you touched the**
 5 **tarps under the brown cover at any time during the**
 6 **ceremony on October 8, 2009? And I'm going to put**
 7 **up on the overhead Exhibit 319.**

8 **A. Yes.**

9 **Q. At any time during the ceremony, did that**
 10 **tarp feel hot?**

11 **A. No.**

12 **Q. When you pulled open the structure after**
 13 **the ceremony was over to pull some people out, do**
 14 **you recall whether anything felt hot to you?**

15 **A. It was not hot.**

16 **Q. The covers never felt hot?**

17 **A. No.**

18 **Q. And we've heard testimony that there was**
 19 **some rocks around the outside of the sweat lodge**
 20 **structure.**

21 **A. Yes, there is.**

22 **Q. I believe we can see some of them in**
 23 **Exhibit 146. Do you see those rocks?**

24 **A. Yes.**

25 **Q. Did you ever touch those rocks at any**

1 time during or after the ceremony on October 8?
 2 **A. Yes. After.**
 3 **Q.** And did they feel hot to you?
 4 **A. No.**
 5 **Q.** Do you recall, Ms. Mercer, when it was
 6 that this brown cover -- let me rephrase that. For
 7 the ceremonies used in 2009, do you recall whether
 8 that brown cover was used?
 9 **A. Yes, it was.**
 10 **Q.** And how about the ceremonies you
 11 performed at Angel Valley in 2008?
 12 **A. Yes.**
 13 **Q.** How about for the ceremonies performed in
 14 Angel Valley in 2007?
 15 **A. I think no. I don't know that we knew**
 16 **about it then.**
 17 **Q.** Okay. For the ceremonies performed in
 18 Angel Valley in 2008, was it used for ceremonies
 19 performed by facilitators other than Mr. Ray
 20 in 2008?
 21 **A. Yes. I think I'm wrong. No. I don't**
 22 **think we used it the first year.**
 23 **Q.** 2007?
 24 **A. Yes.**
 25 **Q.** Okay. For 2008 was that brown cover used

1 for all of the sweat lodge ceremonies performed
 2 that year in Angel Valley?
 3 **A. Yes. Once we became aware of it and**
 4 **that's what its purpose was, it was used on all of**
 5 **the subsequent sweat lodges.**
 6 **Q.** And including all of the ceremonies
 7 in 2009?
 8 **A. Yes.**
 9 **Q.** Whether or not performed by Mr. Ray?
 10 **A. Yes. The ones I did.**
 11 MS. POLK: Your Honor, counsel has agreed to
 12 the admission of exhibits 893, 892 and 891.
 13 THE COURT: 891, -92 and -93 are admitted.
 14 (Exhibits 891 through 893 admitted.)
 15 **Q.** BY MS. POLK: I'm going to put up on the
 16 overhead Exhibit 891, Ms. Mercer. If you need me
 17 to bring it to you, just let me know.
 18 Do you recognize what that is?
 19 **A. Yes.**
 20 **Q.** What do you recognize that to be?
 21 **A. The inside of the sweat lodge.**
 22 **Q.** You had testified about the construction
 23 of this particular -- the frame for this sweat
 24 lodge in -- previously testified about its
 25 construction in late August of 2008 and

1 specifically about the method to connect the
 2 various willow branches. Do you see that method in
 3 this photograph?
 4 **A. Yes.**
 5 **Q.** Can you show the jury in this photograph
 6 how you connected the pieces of the frame together.
 7 **A. They would have been tied here. And you**
 8 **can see the rope here, I think, too.**
 9 **Q.** I'm going to put up Exhibit 892. Does
 10 that also show you?
 11 **A. Yes. Right here.**
 12 **Q.** And then Exhibit 893, the same question.
 13 Tell the jury what we're looking at.
 14 **A. The inside of the sweat lodge where the**
 15 **connections are.**
 16 **Q.** Did you use anything other than this
 17 twine to connect the branches together to form the
 18 frame?
 19 **A. Twine and branches themselves. You twine**
 20 **the branches around themselves.**
 21 **Q.** I want to put up on the overhead
 22 Exhibit 145 and ask you if this exhibit shows the
 23 area where you or your daughter would dust off the
 24 hot rocks before they were delivered to the sweat
 25 lodge?

1 **A. Yes, it does.**
 2 **Q.** Will you show the jury where.
 3 **A. Right here.**
 4 **Q.** Can you estimate for the jury how many
 5 feet that was from the door to the sweat lodge.
 6 **A. 10.**
 7 **Q.** And during Mr. Ray's sweat lodge ceremony
 8 in October of 2009, did you ever take a smoking
 9 break?
 10 **A. No.**
 11 **Q.** Let's talk about now the evening after
 12 the paramedics had responded and you and your
 13 husband went back to your house. Who was at your
 14 house -- who gathered at your house with you?
 15 **A. Sara, Fawn, Ted and I.**
 16 **Q.** How were you feeling?
 17 **A. Not well. I hadn't eaten, and I was**
 18 **feeling nauseous.**
 19 **Q.** Did you get something to eat?
 20 **A. I tried. But at that point it was -- I**
 21 **couldn't eat.**
 22 **Q.** Did you end up going to the hospital?
 23 **A. Yes.**
 24 **Q.** How much time after going back to your
 25 house did you go to the hospital?

1 **A. Maybe an hour. I didn't -- I didn't plan**
 2 **on going to the hospital. I thought Ted was going**
 3 **over to the cafeteria area to just to talk to the**
 4 **EMTs and see what was going on. And then he came**
 5 **back with one and -- that checked me out.**
 6 **Q. What did that paramedic do at the house**
 7 **when he checked you out?**
 8 **A. I don't remember exactly, but I think he**
 9 **just took my vital signs. I don't really remember.**
 10 **Q. Why did you go to the hospital?**
 11 **A. Because the EMTs said they didn't know**
 12 **why people were in the condition they were in, and**
 13 **they thought I should be checked out.**
 14 **Q. Do you recall when it was that you first**
 15 **started feeling sick?**
 16 **A. When I got home -- when we were at the --**
 17 **when we with still at the lodge, I felt bad, but I**
 18 **wasn't feeling nauseous. I was still in the moment**
 19 **of it all. And then when I got home, I think I**
 20 **kind of fell apart. And then that's when I started**
 21 **thinking about what actually had happened. And**
 22 **that's when I started getting nauseous.**
 23 **Q. During the ceremony performed by Mr. Ray**
 24 **and the role that you had attending to the door and**
 25 **taking care of rocks, did you ever feel sick during**

1 any of that?
 2 **A. No. I didn't get sick until I went home.**
 3 **Q. Until you went home?**
 4 **A. Yes.**
 5 **Q. What hospital did you go to?**
 6 **A. The one in Sedona.**
 7 **Q. And how long were you there?**
 8 **A. I don't know.**
 9 **Q. What -- did you see a doctor?**
 10 **A. Yes.**
 11 **Q. What did the doctor do for you?**
 12 **A. I believe I was treated for**
 13 **dehydration --**
 14 MR. KELLY: Your Honor, objection. Move to
 15 strike.
 16 THE COURT: Sustained.
 17 **Q. BY MS. POLK: Without giving us any**
 18 **medical conclusions, were you given any medication?**
 19 **A. They gave me a pill that I put under my**
 20 **tongue.**
 21 **Q. And what was that pill for?**
 22 **A. Nausea.**
 23 **Q. And were you given any other medications?**
 24 **A. I had an oxygen mask and I.V.**
 25 **Q. How long were you at the hospital?**

1 **A. I think the -- once the I.V. ended, I**
 2 **think I left.**
 3 **Q. Did you go home that night?**
 4 **A. Yes.**
 5 **Q. While were you at the hospital, were you**
 6 **questioned by anybody?**
 7 **A. Yes.**
 8 **Q. Who -- do you know the name of the person**
 9 **who questioned you?**
 10 **A. No. I know a lady police came in. But**
 11 **that's all I know.**
 12 **Q. A lady police officer?**
 13 **A. Yes.**
 14 **Q. How long did she question you for? Do**
 15 **you recall?**
 16 **A. No.**
 17 **Q. Was your husband with you when you were**
 18 **questioned?**
 19 **A. Yes.**
 20 **Q. Were you questioned together?**
 21 **A. Yes.**
 22 **Q. What was your condition while you were**
 23 **being questioned?**
 24 **A. I was being treated.**
 25 **Q. Did you have that oxygen mask on?**

1 **A. Yes.**
 2 **Q. And how long would you say you were --**
 3 **had that interview with the police officer?**
 4 **A. I remember it to be short. And it ended**
 5 **abruptly. I think she got called away. I don't**
 6 **remember much of that.**
 7 **Q. You don't remember much of it?**
 8 **A. No.**
 9 **Q. Do you remember if you were just**
 10 **answering questions?**
 11 **A. Yes. I read my transcript. So I know I**
 12 **was there and said that. But I don't --**
 13 **Q. Do you recall whether you were offering**
 14 **information, or were you just answering questions?**
 15 **A. Answering questions.**
 16 **Q. Did you get interviewed a second time by**
 17 **the police?**
 18 **A. Yes.**
 19 **Q. When was that?**
 20 **A. The next day.**
 21 **Q. Where was that?**
 22 **A. On the property of Angel Valley.**
 23 **Q. How did that interview come about? Do**
 24 **you know?**
 25 **A. We -- no. Ted went for a morning walk.**

1 **And he knew that we had to talk to the police**
 2 **before we left the property. And we were leaving,**
 3 **so he had talked to him on his walk. And then he**
 4 **said he found out who we were supposed to talk to.**

5 **And when -- before went to leave, we got**
 6 **in the car and were on the way leaving, stopped**
 7 **there, and I talked to Detective Diskin, and so did**
 8 **Sarah.**

9 Q. So you and your daughter approached the
 10 police to give them your statement?

11 A. **Yeah. Yes.**

12 Q. At some point did you provide photographs
 13 to Detective Diskin?

14 A. **Yes.**

15 Q. Do you recall when that was?

16 A. **A week later. It was sometime later.**

17 Q. Do you recall what the photographs that
 18 you provided to Detective Diskin pertained to?

19 A. **They pertained to the building of the**
 20 **sweat lodge and the 2008 sweat lodge.**

21 Q. Construction?

22 A. **Yes. As well as the event.**

23 Q. When was it that you and your family left
 24 Angel Valley?

25 A. **As in moved?**

1 Q. Yes.

2 A. **The next month after November.**

3 Q. Did you participate a few days later
 4 after October 8 in a ceremony where the sweat lodge
 5 frame was burned?

6 A. **Yes. I was there.**

7 Q. I'm going to put up on the overhead
 8 Exhibit 232.

9 How -- to what degree did you participate
 10 in the ceremony?

11 A. **I was there.**

12 Q. For the whole thing?

13 A. **They -- Angel Valley invited us. They**
 14 **told us about it and invited us. I believe we came**
 15 **after it started, but I think I was there after**
 16 **that.**

17 Q. Did you participate in taking down the
 18 structure?

19 A. **No. I think I just sat there and cried.**

20 **I don't -- I don't remember taking it down.**

21 Q. Were you still pretty upset?

22 A. **Yes.**

23 Q. And I'm going to put up on the overhead
 24 Exhibit 236. Do you recall the burning of the
 25 structure itself?

1 A. **I know I was there, but I don't remember.**

2 Q. Do you need to take a moment?

3 A. **Okay. Is there a question?**

4 Q. No. I just want to make sure you're
 5 okay.

6 A. **Okay.**

7 Q. Do you recall, Ms. Mercer, whether being
 8 around the fire that was burning the structure --
 9 did you get sick in any way from that ceremony?

10 A. **No. Not that I recall.**

11 Q. Did you ever participate in pulling weeds
 12 at any time in the area of the -- where the sweat
 13 lodge was?

14 A. **Yes.**

15 Q. And tell the jury how you took care of
 16 weeds in the area of the sweat lodge.

17 A. **I pulled them by hand.**

18 Q. Did you ever use any chemicals to get rid
 19 of any of the weeds in that area?

20 A. **No.**

21 Q. Did you ever spray saltwater in the area?

22 A. **I did not.**

23 Q. Did you ever hear of that?

24 A. **No.**

25 Q. I want to ask you some questions about

1 the three ceremonies conducted by Mr. Ray at Angel
 2 Valley when you were present during 2007, 2008,
 3 and 2009. First of all, for each of those
 4 ceremonies were you able to hear the tone of voice
 5 used by Mr. Ray in as he conducted his ceremony?

6 A. **Yes.**

7 Q. And will you describe the tone for the
 8 jury.

9 MR. KELLY: Your Honor, I'm going to object to
 10 relevance, 403, 404.

11 THE COURT: Sustained.

12 Q. BY MS. POLK: Were you able to observe
 13 the general nature of Mr. Ray's sweat lodge -- his
 14 ceremonies?

15 MR. KELLY: Same objection.

16 THE COURT: Overruled.

17 THE WITNESS: Yes.

18 Q. BY MS. POLK: And describe the general
 19 nature to the jury.

20 A. **I would describe it as extreme, long and**
 21 **hot and more of a gauntlet. It was, like, the**
 22 **epitome or the graduation challenge they needed to**
 23 **overcome to succeed at being a Spiritual Warrior.**

24 Q. For those three ceremonies for those
 25 three, years, did you observe how the participants

1 interacted with one another?

2 MR. KELLY: Objection. Relevance, 403, and
3 lack of foundation, Judge.

4 THE COURT: Sustained.

5 Q. BY MS. POLK: Did you ever hear Mr. Ray
6 explain to the participants the purpose of his
7 ceremony?

8 A. Yes.

9 Q. And what did you hear Mr. Ray say?

10 MR. KELLY: Objection. Lack of foundation.

11 THE COURT: Sustained as to foundation.

12 Q. BY MS. POLK: On what occasions did you
13 hear Mr. Ray explain to the participants the
14 purpose of his ceremony?

15 A. He would explain it before every sweat
16 lodge.

17 Q. And what did you hear him say?

18 MR. KELLY: Your Honor.

19 THE COURT: Sustained as to foundation.

20 Q. BY MS. POLK: Do you recall, Ms. Mercer,
21 for the 2009 ceremony what you heard Mr. Ray say in
22 explaining the purpose of the ceremony to the
23 participants?

24 A. It was a longer explanation. But it was,
25 like, a rebirth, being born again, dying and being

1 born again.

2 Q. And do you recall what you heard Mr. Ray
3 say in 2008 to the participants prior to his
4 ceremony?

5 MR. KELLY: Your Honor, objection.

6 THE COURT: Overruled.

7 THE WITNESS: Same, similar. The same thing
8 but, again, longer I mean. It's a big, long thing.
9 But that's the gist of it.

10 Q. BY MS. POLK: And the same question for
11 2007.

12 MR. KELLY: Your Honor, same objection.

13 Incorporating the previous objections.

14 THE COURT: Overruled.

15 THE WITNESS: In 2007 I don't know that I
16 heard that. But I would imagine it was the same.

17 MR. KELLY: Your Honor, objection.

18 THE COURT: Sustained. Sustained.

19 Q. BY MS. POLK: Do you know how many rounds
20 the ceremony in 2008 in October conducted by
21 Mr. Ray was?

22 A. Eight.

23 Q. Do you know how many rocks Mr. Ray used?

24 A. I think 88. It was --

25 Q. Are you guessing?

1 A. I'm guessing. I know it was over 50.

2 Q. And I'm going to put up on the overhead
3 Exhibit 145 and ask you a question specifically
4 about the buckets that we see there.

5 A. Yes.

6 Q. Do you recall how many buckets there
7 were?

8 A. Four.

9 Q. Do you recall how many times you filled
10 up those buckets -- you or your daughter?

11 A. Twice.

12 Q. Each bucket was filled up twice?

13 A. At least three buckets were filled twice.

14 Q. Did all three of those buckets full of
15 water go into that sweat lodge twice?

16 A. Yes.

17 Q. So, in other words, six full buckets of
18 water were sent into the sweat lodge?

19 A. Yes.

20 Q. For the ceremony conducted by Mr. Ray
21 in 2009 in October, do you recall how long Mr. Ray
22 kept the door open between rounds?

23 A. Approximately six minutes, six, eight
24 minutes.

25 Q. Long enough to accomplish what?

1 A. Some people leaving and people going back
2 in.

3 Q. And rocks?

4 A. And rocks.

5 Q. And water?

6 A. Yes.

7 Q. Did you observe whether or not Mr. Ray
8 ever allowed any participant in 2009 to take water
9 to drink inside the sweat lodge?

10 A. No.

11 Q. No, you did not observe or no, you did
12 not?

13 A. No. I did not observe anybody having
14 water in his sweat lodges.

15 Q. Mr. Ray's sweat lodges?

16 A. Yes.

17 Q. And that pertains to 2007 and 2008 as
18 well?

19 A. Yes. Inside.

20 Q. And we've heard testimony about tarps
21 that -- in fact, we see them in the photograph
22 that's on the overhead, the tarps that are on the
23 ground?

24 A. Yes.

25 Q. Do you know when you first started

1 putting tarps on the ground?

2 **A. I think we did it in '08 and '09.**

3 **Q.** Do you know whose idea it was?

4 **A. Ted and I.**

5 **Q.** Did you do it for ceremonies conducted by
6 people other than Mr. Ray?

7 **A. No. We had a blanket or blankets.**

8 **Q.** But no tarps?

9 **A. There was never a water -- water was**
10 **never sprayed on anyone else leaving the sweat**
11 **lodge other than Mr. Ray's. And that's why the**
12 **tarps were put there.**

13 **Q.** For the ceremonies that you testified
14 about that you assisted in some way between 2007
15 and 2009 not conducted by Mr. Ray, were you able to
16 observe the interaction between participants and
17 the facilitator or the pourer?

18 **A. Yes.**

19 **Q.** And on every occasion?

20 **A. Yes.**

21 **Q.** Will you describe generally for the jury
22 what you observed.

23 MR. KELLY: Your Honor, objection.

24 THE COURT: Overruled.

25 THE WITNESS: The sweat lodges I saw that

1 weren't James Ray's were always a very loving group
2 experience. The pourer was very much a part of the
3 people and connected to the people that were taking
4 the sweat and was aware of the people in the lodge
5 and always concerned about their condition.

6 MR. KELLY: Your Honor, I'm going to object.

7 THE COURT: Sustained.

8 **Q.** BY MS. POLK: Were you able to observe
9 how long the ceremonies that you assisted not
10 facilitated by Mr. Ray -- how long those ceremonies
11 lasted?

12 **A. Hour, hour and a half.**

13 **Q.** And how many rounds?

14 **A. Four.**

15 **Q.** Did you ever assist a ceremony other than
16 Mr. Ray's that lasted more than four rounds?

17 **A. Not that I recall.**

18 **Q.** And did you observe the interaction
19 between the facilitator and a participant who
20 wanted to leave for a ceremony not conducted by
21 Mr. Ray?

22 MR. KELLY: Your Honor, objection.

23 THE COURT: Sustained.

24 **Q.** BY MS. POLK: Were you able to observe
25 the amount of water used by --

1 MR. KELLY: Your Honor, I'm going to object.

2 May we approach?

3 THE COURT: Okay.

4 (Sidebar conference.)

5 MR. KELLY: Your Honor, as we discussed prior
6 to Ms. Mercer's testimony this morning, I believe
7 this is very dangerous to be going down making
8 comparisons between other sweat lodges not
9 conducted by JRI.

10 I heard the Court this morning talk about
11 limited inquiry into prior sweat lodges and other
12 sweat lodges, and now we're going into the
13 state-of-mind comparisons. From a strict 403
14 perspective, it's highly -- potentially highly
15 prejudicial to my client's due process rights.

16 And then more importantly, Judge, I would
17 just renew our continued objection as to prior
18 sweat lodges, other sweat lodges. And I didn't
19 think it was going to be emphasized.

20 THE COURT: Ms. Polk.

21 MS. POLK: Your Honor, this testimony is
22 directly relevant to the issue of causation. How
23 other facilitators conduct their ceremony compared
24 to Mr. Ray is the issue of causation. It is
25 Mr. Ray's conduct in creating a competitive,

1 superheated environment where he keeps participants
2 in for a long period of time that causes the death
3 of the victims.

4 The defense has challenged causation.
5 And it is relevant to show that ceremonies
6 conducted at Angel Valley either in the same
7 structure or in a different structure -- it doesn't
8 seem to matter -- that when they conduct
9 ceremonies, people do not get sick.

10 When it's Mr. Ray who is conducting the
11 ceremony, people get sick. And that's directly
12 relevant to the issue of causation. When you start
13 talking about organophosphates or sweat lodge
14 structure or the pit being off center, none of that
15 matters. But that makes it directly relevant,
16 then, to causation. What happens when other
17 ceremonies are conducted there, people do not get
18 sick.

19 THE COURT: There has been all this testimony,
20 Ms. Polk, about physical results. Again, I'm
21 saying in one sense it's not even disputed. And
22 then going into this one, this one, this one, makes
23 kind of these offhand comments about when there's
24 something that's not anywhere or that kind of
25 thing --

1 MR. KELLY: I'm sorry, Judge.

2 THE COURT: Go ahead, Ms. Polk.

3 MS. POLK: That's one of the key differences
4 too. That's what causes -- Mr. Ray's conduct is a
5 totality of the circumstances, how he runs the
6 facility, his tone, how he prepared or didn't
7 prepare participants, and, in contrast, how other
8 ceremonies are conducted.

9 It goes to the issue of causation, that
10 it is his conduct, that the totality of the
11 circumstances that make up his conduct that causes
12 people to pass away in his sweat lodge.

13 THE COURT: Ms. Polk, I understand your
14 argument. It's a circumstantial kind of an
15 argument. And there are some very technical
16 questions involving causation. And on one hand, I
17 understand. Circumstantial argument, and isn't
18 this logical, this whole thing, the way he does
19 this is what causes this. It's not a difficult
20 concept to see what you're arguing.

21 The problem is tremendous 403 issues and
22 the characterization suggesting that this is
23 reckless conduct every time. Carries tremendous
24 403 connotations to it. That's the problem with
25 it.

1 MS. POLK: Judge, the issue that the state
2 needs to confront is around every corner the
3 defense is saying something else caused their
4 death. It started with organophosphates. It now
5 looks like they want to blame the structure itself
6 or the off-center pit.

7 What's not clear, they've been
8 referencing pleadings that I haven't seen this
9 morning, and this witness is on the stand now.

10 But, essentially, what the defense is
11 saying is that it is something outside of Mr. Ray's
12 control that causes the death. And so what becomes
13 very relevant is what happens in other sweat lodge
14 ceremonies to combat that it's something outside of
15 Mr. Ray's control that caused the deaths.

16 THE COURT: Mr. Kelly.

17 MR. KELLY: Judge, the problem is the
18 causation asserted by the State of Arizona was heat
19 stroke, which is a medical phenomenon. We've
20 talked about the continuum of heat. That's a
21 physiological response in regards to the
22 individual's body.

23 You cannot make general comparisons
24 between other events with other environmental
25 conditions conducted by other people and other days

1 with other physiological responses and make some
2 type of comparison that somehow that caused the
3 deaths.

4 That is highly improper. It is extremely
5 prejudicial because the jury, of course, doesn't
6 understand these -- potentially may not understand
7 these finer points and convict him based on the
8 fact that he didn't conduct a Native American sweat
9 lodge. That's the problem.

10 MS. POLK: That's not where we're going at
11 all.

12 THE COURT: The whole problem is is how far
13 this goes into expert testimony and -- necessary.
14 And the thing is there is this report that's come
15 out that has been out there for a year, and it's
16 added some things.

17 I've made a 404(b) finding that the
18 manner of conducting these was prior convincing
19 evidence that's substantially the same. I've made
20 that finding. So that's not something that hasn't
21 been through.

22 We're here with this witness, and this is
23 probably going to be the last witness that's going
24 to get into this prior stuff at all unless there is
25 some intrinsic value or some intrinsic basis of

1 admissibility, something like that.

2 But in terms of mechanically
3 describing -- we've gone this far. I'm going to
4 allow that.

5 Mr. Kelly, you've made your objection
6 very clear too.

7 Thank you.

8 (End of sidebar conference.)

9 THE COURT: Ms. Polk, you may continue.

10 MS. POLK: Thank you, Your Honor.

11 **Q.** Ms. Mercer, with respect to ceremonies
12 conducted at Angel Valley between 2007 and 2009 by
13 persons other than Mr. Ray that you were present
14 at, were you able to observe how much water was
15 used by the pourer?

16 **A. Yes.**

17 MR. KELLY: Your Honor, I'm going to object
18 and reassert our discussion at sidebar.

19 THE COURT: Overruled.

20 THE WITNESS: One.

21 **Q.** BY MS. POLK: Tell the jury how much
22 water other facilitators used to conduct their
23 ceremonies.

24 **A. One bucket of water.**

25 **Q.** Did you observe how that was applied to

1 the rocks by the other facilitators?

2 **A. With a soup ladle, a large soup ladle.**

3 **Q.** Were you able to observe how long other
4 facilitators left the door open between rounds?

5 **A. Yes.**

6 **Q.** And how long?

7 MR. KELLY: Your Honor, again I'm going to
8 reassert my objection to other sweat lodges.

9 THE COURT: Overruled.

10 You may answer.

11 THE WITNESS: As long as people needed to feel
12 comfortable.

13 MR. KELLY: Your Honor, objection.

14 THE COURT: Sustained.

15 **Q.** BY MS. POLK: Now without -- in terms of
16 minutes, how long did you observe the door left
17 open by other facilitators?

18 **A. It would range from 10 minutes to leaving**
19 **it open for the entire round.**

20 **Q.** What does that mean to leave a door open
21 for an entire round?

22 **A. Means the pourer continues the ceremony**
23 **with the door open.**

24 **Q.** Were you able to observe whether
25 participants inside those ceremonies conducted by

1 people other than Mr. Ray were allowed to have
2 water to drink inside?

3 MR. KELLY: Your Honor, objection.

4 THE COURT: Overruled.

5 THE WITNESS: Yes. They were.

6 **Q.** BY MS. POLK: Ms. Mercer, I'm going to
7 put up on the overhead Exhibit 841, which is a
8 photograph from the 2008 sweat lodge conducted by
9 Mr. Ray.

10 Did you ever see a scene like this for
11 ceremonies conducted by facilitators other than
12 Mr. Ray?

13 MR. KELLY: Your Honor, objection.

14 THE COURT: Sustained.

15 **Q.** BY MS. POLK: Did you notice a
16 difference -- this is a yes or no question. Did
17 you notice a difference between Mr. Ray's sweat
18 lodge ceremony of 2008 and the ceremony that he
19 facilitated in 2009?

20 **A. Yes.**

21 **Q.** And what difference did you notice?

22 MR. KELLY: Your Honor, objection.

23 THE COURT: Sustained as to form.

24 **Q.** BY MS. POLK: Did you observe whether --
25 did you observe the number of people outside

1 Mr. Ray's sweat lodge ceremony in 2009 before it
2 was over?

3 **A. Yes.**

4 **Q.** And was that different from what you had
5 observed in 2008?

6 **A. Yes.**

7 **Q.** And how was it different?

8 **A. In 2008 more than half the people were**
9 **outside.**

10 **Q.** Before the last round?

11 **A. Yes. And in 2009 there was significantly**
12 **less people outside.**

13 **Q.** More people inside?

14 **A. Yes.**

15 **Q.** Were you able in 2009 to hear how -- the
16 words that Mr. Ray used when he spoke to
17 participants about leaving his sweat lodge
18 ceremony? That's a yes or no.

19 **A. Yes.**

20 **Q.** Did you also hear the words that Mr. Ray
21 used in 2008 to people who were leaving the
22 ceremony during the ceremony?

23 **A. Yes.**

24 **Q.** Did you observe a difference between the
25 words Mr. Ray used in 2009 and what he said

1 in 2008?

2 MR. KELLY: Your Honor, objection.

3 THE COURT: Overruled.

4 **Q.** BY MS. POLK: That's a yes or no. Did
5 you observe a difference?

6 **A. Yes.**

7 **Q.** And how was it different?

8 MR. KELLY: Your Honor, objection.

9 THE COURT: Overruled.

10 THE WITNESS: He was tougher.

11 MR. KELLY: Your Honor, objection. Ask the
12 answer be stricken.

13 THE COURT: Sustained.

14 **Q.** BY MS. POLK: In terms of the words that
15 you heard Mr. Ray use in 2009, did you hear him say
16 things that he had not said in 2008 to participants
17 who wanted to leave the ceremony? That's a yes or
18 no.

19 **A. Yes.**

20 **Q.** What did you hear him say in 2009 that
21 was different?

22 MR. KELLY: Your Honor, I'd ask that 801(d)(2)
23 be invoked.

24 THE COURT: Overruled.

25 **Q.** BY MS. POLK: That means you can answer.

1 **A. And the question was what did I hear him**
2 **say?**

3 **Q.** What did you hear Mr. Ray say in 2009 to
4 participants who were leaving or wanted to leave
5 his ceremony that was different from 2008?

6 **A. He said you're more than that. You are**
7 **not your body.**

8 **Q.** Did you hear that in 2008?

9 **A. No.**

10 **Q.** Is there something else you heard
11 in 2009?

12 **A. That to be reborn you have to die.**

13 **Q.** And when did you hear Mr. Ray say that?

14 **A. During the 2009 sweat lodge.**

15 **Q.** Okay. What else do you recall hearing?

16 **A. Play full on. You're more than that, and**
17 **particularly to worry about yourself and your**
18 **journey.**

19 **Q.** What do you mean by that?

20 MR. KELLY: Your Honor, objection.

21 THE COURT: Sustained.

22 **Q.** BY MS. POLK: Did you hear Mr. Ray use --
23 say to somebody something about a journey?

24 MR. KELLY: Your Honor, objection. Leading,
25 improper.

1 THE COURT: Overruled.

2 THE WITNESS: He would explain that --

3 MR. KELLY: Your Honor, objection.

4 THE COURT: Unresponsive. Sustained.

5 **Q.** BY MS. POLK: What did you hear Mr. Ray
6 say, what words you heard him say?

7 **A. This is your journey. Take care of**
8 **yourself. You're more than your body. You need to**
9 **leave your body to live.**

10 MR. KELLY: Your Honor, I'm going to object
11 based on Rule 15 nondisclosure. Request the last
12 sentence be stricken. That's an 801(d)(2)
13 statement. My client has not been disclosed under
14 Rule 15, Judge.

15 THE COURT: Overruled.

16 **Q.** BY MS. POLK: And was that different from
17 what you heard -- yes or no. Was that different
18 from what you heard Mr. Ray say in 2008 to the
19 participants?

20 **A. Yes.**

21 **Q.** You have already told the jury about the
22 conversations you heard inside the sweat lodge with
23 respect to people unconscious or not breathing.
24 Was that different from 2008?

25 MR. KELLY: Objection. Form of the question.

1 THE COURT: Sustained.

2 **Q.** BY MS. POLK: With respect to the
3 conversations that you heard that you already
4 testified to about 2009, was that different
5 from 2008?

6 **A. Yes.**

7 **Q.** How so?

8 **A. I had never heard anyone say someone was**
9 **unconscious and then be left in there.**

10 **Q.** Prior to October 8?

11 **A. Yes. People left.**

12 MR. KELLY: Your Honor, objection.

13 THE COURT: There is no question.

14 **Q.** BY MS. POLK: In 2008 did you hear of
15 anybody being left inside who was not breathing?

16 MR. KELLY: Your Honor, objection. 403,
17 relevance.

18 THE COURT: Ladies and gentlemen, we're going
19 to go ahead and take the morning recess. Please
20 remember the admonition.

21 Ms. Mercer, you will be excused at this
22 time. Remember that rule of exclusion I've
23 discussed with you several times.

24 I'm going to ask the parties to remain.

25 Please be reassembled at 11:00, about 20

1 minutes. Thank you.

2 (Proceedings continued outside presence
3 of jury.)

4 THE COURT: Mr. Kelly.

5 MR. KELLY: Judge --

6 THE COURT: And I'll note the witness has
7 exited the courtroom and the jury also.

8 MR. KELLY: I have a concern under 15.1(d)(2).

9 The State of Arizona is required to disclose all
10 statements of the defendant. We have received
11 copies of Ms. Mercer's interviews conducted by
12 individuals from the State of Arizona as well as
13 her 9-1-1 call directed toward the dispatcher.

14 We've heard her testimony during an
15 evidentiary hearing in November of 2010. And this
16 witness continues to do two things. One is to add
17 purported statements of my client, which were
18 purportedly made in 2008 and 2009 that we've never
19 received any notice of.

20 And then, secondly, she mischaracterizes
21 and takes out of 801(d)(2) an actual statement and
22 begins to add an interpretation of that statement.
23 And that's my frustration, Judge, is we have --
24 this is the first time we've heard of some of
25 these. And I realize Ms. Polk -- we'll hear her

1 response. Maybe she doesn't know the witness is
2 now gratuitously volunteering additional purported
3 statements.

4 She should not be allowed to interpret
5 what they mean. And I would ask that she be
6 cautioned to providing exact statements which were
7 purportedly made by Mr. Ray consistent with Rule 15
8 and not interpret meanings.

9 And then, secondly, Judge, and more
10 importantly, again, as I mentioned at the sidebar,
11 I heard this morning that there was going to be
12 limited discussion as to other sweat lodge
13 ceremonies. Mr. Li and Ms. Polk argued 404(b),
14 relevance, prejudice, et cetera, whether or not
15 Dr. Mosley's statement yesterday destroys their
16 causation argument.

17 And, again, I would assert that
18 comparisons to other sweat lodges have gone way
19 beyond any relevance in this case, and it's
20 becoming highly prejudicial. And I would reassert
21 my concern that now I'm in this difficult position
22 during cross-examination as to either having to try
23 to ignore something that I believe is irrelevant
24 and prejudicial or address it to clarify to the
25 jury.

1 MR. HUGHES: Your Honor, in response, the term
2 "statement" that's used in 15.1 is a term of art,
3 defined in 15.4(a) as a writing, signed or
4 otherwise, adopted by person or a mechanical,
5 electronic or other recording of a person's oral
6 communications or a transcript or a writing
7 containing a verbatim record. It does not include
8 a witness's recollection or knowledge of what was
9 said.

10 Ms. Mercer was available to the defense
11 for interview, or for apparently tactical reasons
12 they chose not to interview and get the exact
13 statement that she has.

14 Now, I would agree that if she is
15 interpreting what does Mr. Ray mean, that's
16 speculation and it's not appropriate. But her
17 recollection of what Mr. Ray had to say is directly
18 relevant to the issues -- their admission or
19 statement against interests by Mr. Ray. And
20 they're admissible under Rule 801.

21 THE COURT: I think I've sustained objections
22 when the witness got into trying to interpret what
23 something meant. That certainly would be my intent
24 not to let testimony like that be out there.

25 MR. KELLY: Judge, I'll make the final

1 comment. And it is that we did interview
2 Dr. Mosley yesterday. You're going to read his
3 exact opinion provided during that interview. He
4 is a medical doctor. And we have some significant
5 concerns now about this causation theory as it was
6 again articulated by Ms. Polk at the sidebar
7 conference. We believe we have some real problems
8 in this case.

9 THE COURT: And I mentioned this could be an
10 issue that involves expert testimony. I mentioned
11 that. I thought we had the testimony completed,
12 essentially, on prior sweat lodges. I gave the
13 limiting instruction at one point at the request.
14 I thought that was, basically, the conclusion of
15 that.

16 But the other matter is this question
17 that involves the breathing.

18 And, Ms. Polk, you started off with
19 attempting to clarify that.

20 And I thought that was one of your
21 objections, Mr. Kelly, is that reference to
22 unresponsive or breathing.

23 MR. KELLY: Correct, Judge.

24 THE COURT: Ms. Polk, you keep mentioning the
25 not breathing.

1 MS. POLK: Your Honor, I was trying to -- the
2 rules allow the question to be framed in such a way
3 as to direct a witness to a specific area of
4 testimony. And I was trying to direct her
5 specifically to whether or not she heard anything
6 similar in 2008. And the answer is no.

7 THE COURT: And I understand that purpose.

8 MS. POLK: If I misphrased her testimony, that
9 was unintentional. I was trying to direct
10 specifically to the conversations that she had
11 overheard pertained to Liz Neuman and to Kirby
12 Brown.

13 THE COURT: We will recess. I want to resume
14 about five after.

15 Thank you.

16 (Recess.)

17 (Proceedings continued in the presence of
18 jury.)

19 THE COURT: The record will show the presence
20 of the defendant, Mr. Ray; the attorneys, and the
21 jury. Ms. Mercer has turned returned to the
22 witness stand.

23 Ms. Polk.

24 MS. POLK: Thank you, Your Honor.

25 Q. Ms. Mercer, for Mr. Ray's sweat lodge

1 ceremony that he conducted in September of 2008,
2 did you ever hear any statements about anyone being
3 unconscious inside during the ceremony?

4 **A. No.**

5 **Q.** And for the ceremony that Mr. Ray
6 conducted at Angel Valley in 2007, same question.
7 During the ceremony did you ever hear any
8 statements about anyone being unconscious?

9 **A. No.**

10 **Q.** After the -- Mr. Ray concluded his
11 ceremony in 2008, did you look inside the sweat
12 lodge?

13 **A. I did. But it was a while after.**

14 **Q.** And a while after what did you see?

15 **A. Towels.**

16 **Q.** After Mr. Ray concluded his ceremony
17 in 2008, do you know -- were you present when
18 everybody came out?

19 **A. Yes.**

20 **Q.** And do you know whether or not everybody
21 came out on their own volition?

22 **A. Yes. I know they did not.**

23 **Q.** And how do you know that they did not?

24 **A. I helped several.**

25 **Q.** And what was the condition of those

1 people that you helped out in 2008?

2 **A. They needed help. They were unable to**
3 **get their body -- to get them out or they were**
4 **passed out. There were some people that walked**
5 **out. But at the end several were dragged out.**

6 **Q.** And for those that were dragged out in
7 the ceremony conducted in 2008 by Mr. Ray, were all
8 of them brought out immediately following the
9 conclusion of the ceremony?

10 **A. All of them?**

11 **Q.** Anybody who was --

12 MR. KELLY: Your Honor, object on lack of
13 foundation.

14 THE COURT: Overruled.

15 You may ask the question, Ms. Polk.

16 **Q.** BY MS. POLK: You testified that people
17 were passed out when the ceremony concluded
18 in 2008? Was that your testimony?

19 **A. I don't know that I know that there was**
20 **people passed out inside in 2008. No. I don't**
21 **think I said that.**

22 **Q.** So for the people that you helped out

23 in 2008, when the ceremony was over --

24 **A. Yes.**

25 **Q.** Once you helped them out, was anybody

1 left inside?

2 **A. No.**

3 **Q.** And how long in 2008 did it take you to
4 get people out?

5 MR. KELLY: Your Honor, I'm going to object to
6 the form of the question.

7 THE COURT: Sustained.

8 **Q.** BY MS. POLK: In 2008 did you assist
9 anybody to get out of the sweat lodge in any manner
10 other than the door?

11 **A. No.**

12 **Q.** And how about for 2007?

13 **A. No.**

14 **Q.** When was it that you and your husband
15 decided to leave -- to stop living at Angel Valley?

16 **A. After the James Ray event of 2009.**

17 **Q.** Immediately following?

18 **A. Yeah. We started looking for a place**
19 **right after that.**

20 **Q.** Thank you, Ms. Mercer.

21 Thank you, Your Honor.

22 THE COURT: Thank you, Ms. Polk.

23 Mr. Kelly.

24 MR. KELLY: Thank you, Judge.

25 / / /

CROSS-EXAMINATION

2 BY MR. KELLY:

3 **Q.** Ms. Mercer, I believe I understand your
4 testimony to be that JRI ceremonies were not loving
5 experiences. Correct?

6 **A. I don't -- no.**

7 **Q.** You told us a moment ago that the JRI
8 ceremonies were extreme. They were long. They
9 were hot. They were challenging. And you would
10 describe them almost as a gauntlet; correct?

11 **A. Correct.**

12 **Q.** And you contrasted that to some Native
13 American sweat lodges that you described as being
14 very loving; correct?

15 **A. Yes.**

16 **Q.** So my question was, you would agree with
17 me that it's your opinion that the JRI seminars
18 were not loving experiences or ceremonies; correct?

19 **A. My experience of the JRI sweat lodge was**
20 **not a loving experience.**

21 **Q.** And you knew that James Ray International
22 was a corporation; correct?

23 **A. Yes.**

24 **Q.** And that Angel Valley during that

25 five-day period in October of 2009, that this these

1 activities were corporate exercises; correct?

2 Do you understand my question?

3 **A. I do. What's the difference between a**
4 **corporate exercise and spiritual exercise?**

5 **Q.** Well, that's what I want to try to point
6 out to this jury, that you've described some other
7 sweat lodge experiences that you've been involved
8 with; correct?

9 **A. Yes.**

10 **Q.** And you described them as Native
11 American; correct?

12 **A. I don't know that I described it as**
13 **Native American. I don't know that I know what a**
14 **Native American sweat lodge is. I know what Angel**
15 **Valley had me do sweat lodges. So the**
16 **experiences --**

17 **Q.** You would describe them as more
18 spiritual; correct?

19 **A. Yes.**

20 **Q.** And my point is that the JRI ceremonies
21 were corporate exercises. Correct?

22 **A. Okay.**

23 **Q.** Were you aware they were designed to help
24 people overcome personal issues?

25 **A. Isn't that what a spiritual is? I'm**

1 **sorry.**

2 THE COURT: Ms. Mercer, please answer the
3 question, if you can, with a yes or no if it's
4 presented in that fashion. If you can't, you can
5 let the attorney know you're not able to answer in
6 that fashion. Please listen to the attorney's
7 questions and answer the question.

8 **Q.** BY MR. KELLY: Let me try it from this
9 perspective: Last week on direct you described the
10 participants in the JRI event in October of 2009 as
11 crazy Americans. Do you recall saying that?

12 **A. Yes.**

13 **Q.** And you would agree with me, Ms. Mercer,
14 that crazy Americans do many things that cause them
15 to challenge personal limits; correct?

16 **A. Yes. But I don't think so --**

17 **Q.** Crazy Americans might climb mountains;
18 correct?

19 **A. Yes.**

20 **Q.** Crazy Americans might run a marathon;
21 correct?

22 **A. Yes.**

23 **Q.** Crazy Americans might drive a fast car;
24 correct?

25 **A. Yes.**

1 **Q.** Crazy Americans may ride motorcycles;
2 correct?

3 **A. Yes.**

4 **Q.** Crazy Americans may engage in competitive
5 sporting activities; correct?

6 **A. Yes.**

7 **Q.** And JRI International was a corporate
8 exercise where these crazy Americans were
9 attempting to achieve personal goals; correct?

10 That's your understanding; right?

11 **A. Yes.**

12 **Q.** Now, that is contrasted to other events
13 at Angel Valley which may be more of a spiritual
14 focus; correct?

15 **A. Yes.**

16 **Q.** And I don't mean to imply, Ms. Mercer,
17 there may not be a spiritual aspect to the JRI
18 activities. But there is that distinction that I
19 pointed out; correct?

20 **A. Yes.**

21 **Q.** And as a result, as you stated, the JRI
22 sweat lodges were more extreme; correct?

23 **A. Yes.**

24 **Q.** They were longer; correct?

25 **A. Yes.**

1 **Q.** They were hotter; correct?

2 **A. Yes.**

3 **Q.** As an example, did you meet a participant
4 in 2009 by the name of Scott Barratt?

5 **A. I don't know.**

6 **Q.** Would it surprise you to learn that a
7 participant such as Mr. Barratt attended the JRI
8 seminar as a challenge to overcome personal issues
9 and to accept the extreme nature of the sweat lodge
10 as a challenge?

11 **A. No.**

12 **Q.** In fact, you heard people talking about
13 that as they were entering the sweat lodge during
14 October of 2009; correct?

15 **A. Yes.**

16 **Q.** Now, you understand that when crazy
17 Americans are pushed to the limit of their physical
18 and emotional endurance levels, many things can
19 happen; correct?

20 **A. Yes.**

21 **Q.** People can climb mountains and become ill
22 because of altitude sickness; correct?

23 **A. Yes.**

24 **Q.** People can run a marathon and pass out;
25 correct?

- 1 **A. Yes.**
 2 **Q.** People can run a marathon and throw up;
 3 correct?
 4 **A. Yes.**
 5 **Q.** People who run marathons have the choice
 6 as to when to stop; correct?
 7 **A. Yes.**
 8 **Q.** People who run marathons are encouraged
 9 by other participants to complete the race;
 10 correct?
 11 **A. Yes.**
 12 **Q.** Sometimes people run marathons and they
 13 say I just want to jog? I don't want to compete;
 14 correct?
 15 **A. I've never known anyone in a marathon.**
 16 **Q.** You've never known anyone who has run a
 17 10 K or a marathon?
 18 **A. No, I have not.**
 19 **Q.** Have you ever met anyone who climbed a
 20 mountain like Denali?
 21 **A. No, I have not. Not that I know of.**
 22 **Q.** Have you read or heard about people who
 23 actually die trying to climb Denali?
 24 **A. I've heard that.**
 25 **Q.** Have you heard of people who die who run

- 1 marathons, push beyond their physiological limits?
 2 **A. I don't think I have.**
 3 **Q.** Have you heard of people who die when
 4 they race dirt bikes in an attempt to win the race?
 5 Have you heard about that?
 6 **A. I don't watch the news. I may not hear**
 7 **as much as -- I don't know of anyone who died in a**
 8 **motorcycle race.**
 9 **Q.** Okay. About what about a stock car race?
 10 Have you watched stock car races on TV? Ever seen
 11 that?
 12 **A. Yes.**
 13 **Q.** Seen people die when they exceed the
 14 limits of the stock car race?
 15 **A. Yes.**
 16 **Q.** Their pit boss might be saying your tires
 17 are getting worn out. I want to win. I'm going to
 18 do it. I'm going to do it. They crash and died;
 19 right?
 20 **A. Yes.**
 21 **Q.** And this JRI sweat lodge experience, the
 22 five-day corporate exercise, was to help people who
 23 were identifying personal issues in attempting to
 24 overcome those issues; correct?
 25 **A. Yes.**

- 1 **Q.** And in doing so, you saw some people
 2 throw up; correct?
 3 **A. Yes.**
 4 **Q.** You saw people become unconscious;
 5 correct?
 6 **A. Yes.**
 7 **Q.** And, of course, unfortunately three
 8 people died; correct?
 9 **A. Yes.**
 10 **Q.** And many others got sick; correct?
 11 **A. Yes.**
 12 **Q.** But one thing that you and your husband
 13 told the police and could not dispute is each of
 14 those individuals participating in the October 2009
 15 sweat lodge were free not to participate; correct?
 16 **A. I can't answer that. That would be a yes**
 17 **or no question.**
 18 **Q.** Were you aware of a participant by the
 19 name of Elsa Hefstad, who did not go into the sweat
 20 lodge but left?
 21 **A. Who never went into the sweat lodge?**
 22 **Q.** Who never went in. Heard Mr. Ray's --
 23 **A. No. I don't know.**
 24 **Q.** -- presweat lodge presentation and said
 25 I'm not going to do that and left?

- 1 **A. No.**
 2 **Q.** Would you have any doubt to believe that
 3 people were free to leave if they chose to do that?
 4 **A. I can't answer that.**
 5 **Q.** Do you have any doubt that people were
 6 free to leave at any time during the five-day
 7 seminar?
 8 **A. They were free to leave during this**
 9 **five-day seminar. Yes.**
 10 **Q.** You have no doubt that people were free
 11 to leave during the ceremony itself; correct?
 12 **A. No.**
 13 **Q.** Well, you told us that people came out of
 14 the sweat lodge at the various rounds; correct?
 15 **A. Yes.**
 16 **Q.** So you don't have any reason to doubt
 17 that people were free to exercise free will and
 18 leave the sweat lodge whenever they decided to do;
 19 correct?
 20 **A. No.**
 21 **Q.** No?
 22 **A. No.**
 23 **Q.** You do not agree with that statement?
 24 **A. I do not agree with that statement.**
 25 **Q.** You saw people leave, I believe you told

1 us, in the varying rounds up until the end of the
 2 sweat lodge. Correct?
 3 **A. Yes.**
 4 **Q.** You never saw anyone -- you never saw
 5 Mr. Ray hold someone back physically when they
 6 attempted to leave; correct?
 7 **A. No.**
 8 **Q.** You never saw anyone push them into the
 9 sweat lodge; correct?
 10 **A. I never saw them succeed in pushing them**
 11 **into the sweat lodge.**
 12 **Q.** You told us about two Dream Team members;
 13 correct?
 14 **A. Uh-huh.**
 15 **Q.** My questions are focused on Mr. Ray. So
 16 I apologize if that wasn't clear. You never saw
 17 Mr. Ray force a person to stay in the sweat lodge;
 18 correct?
 19 **A. No, I did not.**
 20 **Q.** You never heard him try to overcome
 21 any -- physically overcome any effort if they
 22 wanted to leave; correct?
 23 **A. Correct.**
 24 **Q.** What you heard him say were words of
 25 encouragement; correct?

1 **A. That's -- I can't answer that.**
 2 **Q.** Well, you're more than that. You're more
 3 than you're body, I think you told us. Correct?
 4 **A. I don't consider those words of**
 5 **encouragement.**
 6 **Q.** Well, were those the actual words?
 7 **A. Yes.**
 8 **Q.** So if you hit the wall at 22 miles in a
 9 marathon, and someone on the side or your coach or
 10 another participant says, you're more than that;
 11 you can run true this wall, those to you are not
 12 words of encouragement?
 13 **A. I can't answer that question that way.**
 14 **Q.** Mr. Li is climbing Denali and his
 15 climbing buddy wants to turn back. And he says,
 16 you can do it. You're more than that. You can
 17 make it through this high altitude sickness. Would
 18 those be words of encouragement?
 19 **A. Who is the guy? Who is the guy saying**
 20 **that?**
 21 **Q.** His climbing buddy. Mr. Li is telling
 22 him that.
 23 **A. Can I answer, or do I have to answer yes**
 24 **or no? I would think if a person is their buddy or**
 25 **partner or their coach, they care about that person**

1 **and they're concerned for their well being, not**
 2 **just their overcoming goals.**
 3 **Q.** So if Laura Tucker, a participant, is in
 4 the sweat lodge and leaning against her knees is
 5 Liz Neuman, and Laura says, are you okay? And Liz
 6 says yes, and they encourage one to stay in, do you
 7 believe that could happen?
 8 **A. I believe that could happen.**
 9 **Q.** And, again, you didn't hear that;
 10 correct?
 11 **A. No, I did not.**
 12 **Q.** Because you were outside; correct?
 13 **A. I can hear, but I did not hear what you**
 14 **just said.**
 15 **Q.** But you don't have any reason to dispute
 16 that's true; right?
 17 **A. No, I don't.**
 18 **Q.** Laura Tucker took the witness stand and
 19 told us that during the first week of this trial.
 20 **A. Was there a question --**
 21 **Q.** Correct? You don't have any reason to
 22 dispute that a witness took that witness stand and
 23 told us that information in the first week of this
 24 trial?
 25 **A. I would not dispute that.**

1 **Q.** And Mr. Ray is saying you're more than
 2 that. Are those not -- could they not be
 3 interpreted as words of encouragement?
 4 **A. Yes, they could.**
 5 **Q.** Now, you told us that you were born in
 6 Chicago; correct?
 7 **A. Yes. Suburb of Chicago.**
 8 **Q.** And you've been an administrator for
 9 Health Insurance Solutions Corporation since 2000;
 10 correct?
 11 **A. Yes.**
 12 **Q.** And how long have you lived here in
 13 Arizona?
 14 **A. Since 1989.**
 15 **Q.** And when did you first learn about or
 16 become familiar with Angel Valley?
 17 **A. The end of 2005.**
 18 **Q.** When did you and your husband move and
 19 begin residing at Angel Valley?
 20 **A. 2007.**
 21 **Q.** And at that time was there an individual
 22 named Gary, who was the manager of Angel Valley, if
 23 that's the right term?
 24 **A. He -- at what time, though?**
 25 **Q.** I'm asking you did you meet a person by

1 the name of Gary?

2 **A. Yes.**

3 **Q. Is his last name Palisch?**

4 **A. Yes.**

5 **Q. When did you meet Gary Palisch?**

6 **A. Six months after we started volunteering**
7 **there.**

8 **Q. And that would have been in 2005?**

9 **A. No. It would have been in 2007. We**
10 **started volunteering in 2006. So it would have**
11 **been the end of 2006, the beginning of 2007, when**
12 **we met Gary.**

13 **Q. When you met Gary Palisch, he was the**
14 **manager of Angel Valley?**

15 **A. When we met him, he was not. But he**
16 **later became the manager. Yes. I don't know if he**
17 **was actually. I didn't know that he was the**
18 **manager until 2007.**

19 **Q. Did you meet a lady by the name of Fawn**
20 **Foster?**

21 **A. Yes.**

22 **Q. And are you close friends with Fawn?**

23 **A. Yes.**

24 **Q. When did you first meet Fawn?**

25 **A. 2008? I couldn't tell you.**

1 **Q. Did you meet Fawn in 2008 when she was**
2 **working at Angel Valley as well?**

3 **A. Yes.**

4 **Q. So I understand your testimony clearly,**
5 **you moved to Angel Valley in 2006; is that correct?**

6 **A. No.**

7 **Q. 2007?**

8 **A. Yes. But I -- I was still going back and**
9 **forth. The trailer was there, and Ted was working**
10 **there, and I was volunteering and going back and**
11 **forth.**

12 **Q. Back and forth from where?**

13 **A. From Angel Valley to my job at Health**
14 **Insurance Solutions.**

15 **Q. In what community?**

16 **A. Sun City, Arizona.**

17 **Q. You're going back and forth. Ted is**
18 **staying on the property?**

19 **A. Correct.**

20 **Q. And your two children were staying with**
21 **him on the property?**

22 **A. No. My children were adults. My son was**
23 **an adult. My daughter was staying in Wickenburg.**

24 **Q. Sarah was 17 in October of 2009?**

25 **A. Yes, sir.**

1 **Q. So my question is, if I understand your**
2 **testimony, you first became familiar with Angel**
3 **Valley in 2005; correct?**

4 **A. Correct.**

5 **Q. And how so? What brought you to Angel**
6 **Valley in 2005?**

7 **A. I believe I saw a brochure in Sedona.**

8 **Q. Did you pay money to go to Angel Valley**
9 **the first time?**

10 **A. No. We didn't enter the property.**

11 **Q. So you just came and looked at it?**

12 **A. Uh-huh.**

13 **Q. Have you seen the website?**

14 **A. Yes. Not the current website. I mean,**
15 **three websites ago. Yes.**

16 **Q. And I'm still not clear. How did you**
17 **first make contact with individuals at Angel**
18 **Valley? What was --**

19 **A. We walked onto the property and said we**
20 **wanted to look around. And it was donation at the**
21 **time. You paid a donation. And we visited the**
22 **property for the day.**

23 **Q. And that was in 2005?**

24 **A. 2006. 2005 we went there and saw it.**

25 **Q. And then you agreed to volunteer?**

1 **A. Yes.**

2 **Q. Now, did you ever pay money to stay at**
3 **Angel Valley?**

4 **A. Yes. Well, not -- you mean for the**
5 **lodging? No.**

6 **Q. What context did you have to pay money to**
7 **stay there or to go there?**

8 **A. When we were going there, we would pay**
9 **the donation to be on the property before we**
10 **started volunteering. We would pay to -- for the**
11 **day use.**

12 **Q. So they had a day-use fee that would**
13 **allow you to tour the property?**

14 **A. To use the property. They have an angel**
15 **wheel, and they have a labyrinth. They have**
16 **meditation rooms and the creek. So you pay a fee,**
17 **and you could use anything on the property as long**
18 **as another a group or something wasn't there.**

19 **Q. And that fee did not include room or**
20 **food; correct?**

21 **A. No.**

22 **Q. And you paid that the first time in 2006?**

23 **A. Uh-huh. And subsequent times until we**
24 **started volunteering.**

25 **Q. How much did they charge?**

1 **A. It was donation.**
 2 **Q. 20 bucks? 40 bucks?**
 3 **A. Whatever you felt like donating. A**
 4 **donation is a donation. You could give \$2. You**
 5 **could give \$20.**
 6 **Are you asking me how much I gave?**
 7 **Q. Do you remember?**
 8 **A. I do. Because the first time I didn't**
 9 **have any money, and I gave \$2. And the next time**
 10 **we came, I gave \$40.**
 11 **Q. And other people were there donating**
 12 **money as well; correct?**
 13 **A. When I was there, I never saw any other**
 14 **visitors on the property. I would assume they did.**
 15 **Q. At what point did you meet Amayra and**
 16 **Michael Hamilton?**
 17 **A. After we started volunteering. By the**
 18 **second time.**
 19 **Q. Was Gary still working for them?**
 20 **A. That would have been before I knew Gary.**
 21 **Q. So you met Amayra and Michael before you**
 22 **met Gary?**
 23 **A. Yes.**
 24 **Q. And -- were you aware that Michael and**
 25 **Amayra claimed to be ordained ministers?**

1 **A. Yes. One of the -- yes.**
 2 **Q. Did you know that Angel Valley also**
 3 **claims to be a church?**
 4 **MS. POLK: Your Honor, objection. That is**
 5 **misinformation.**
 6 **THE COURT: Sustained.**
 7 **Q. BY MR. KELLY: Are you aware on the**
 8 **website that Angel Valley appears as a ministry?**
 9 **A. When I went there?**
 10 **Q. Yeah.**
 11 **A. I don't think it said ministry. But one**
 12 **of the reasons I went was they had a Sunday**
 13 **service. And I tried to make it for the Sunday**
 14 **service, but I never made it. But then we just**
 15 **went and stayed there the rest of the day because**
 16 **services was in the morning.**
 17 **Q. Are you aware that Angel Valley and the**
 18 **Hamiltons, then, would rent the facility to groups?**
 19 **A. Yes. I'm aware of that.**
 20 **Q. And they would charge money to rent to**
 21 **these groups; correct?**
 22 **A. Yes.**
 23 **Q. And they charged money to James Ray**
 24 **International when that corporate entity rented the**
 25 **facilities during the three years you were there;**

1 correct?
 2 **A. I don't know -- yes.**
 3 **Q. And you knew that when these retreat**
 4 **groups would show up at Angel Valley, that they**
 5 **were always served a vegetarian diet; right?**
 6 **A. No.**
 7 **Q. You didn't know that?**
 8 **A. They weren't always a vegetarian diet.**
 9 **They had a choice. The facilitator had a choice if**
 10 **it was a vegetarian menu.**
 11 **Q. So your recollection is that sometimes**
 12 **there was a vegetarian menu; right?**
 13 **A. Yes.**
 14 **Q. And that vegetarian menu did not cause**
 15 **any ill effects to the groups or participants that**
 16 **came to Angel Valley; correct?**
 17 **A. That I'm aware of? That people got ill?**
 18 **Q. Let me rephrase my question. Do you**
 19 **believe that a vegetarian diet is somehow going to**
 20 **cause someone to not be normal?**
 21 **A. It can affect their digestive system.**
 22 **And I've seen that.**
 23 **Q. So you're not a vegetarian, I take it?**
 24 **A. No.**
 25 **Q. You don't think vegetarians could maybe**

1 run marathons very well?
 2 **A. Oh, I'm sure they could.**
 3 **Q. Do you think a vegetarian diet is going**
 4 **to affect someone's mental status?**
 5 **A. If they're vegetarian -- if this person a**
 6 **vegetarian?**
 7 **Q. Yeah.**
 8 **A. And they're eating a vegetarian meal?**
 9 **No.**
 10 **Q. Okay. Let's say a person like me who is**
 11 **not a vegetarian goes to Angel Valley and eats a**
 12 **vegetarian diet for five days.**
 13 **A. Yes.**
 14 **Q. Is it your testimony that my mental**
 15 **status is going to be affected because I eat**
 16 **vegetarian for five days?**
 17 **A. No. Your digestive system --**
 18 **Q. Okay. But I'm asking about your state of**
 19 **mind. Any problem with that?**
 20 **A. Might be hungry. But no.**
 21 **Q. I'd agree. I raise cattle --**
 22 **A. -- things before.**
 23 **Q. My question, Ms. Mercer, is because I**
 24 **thought you alluded on direct examination that**
 25 **somehow the vegetarian diet offered to JRI by Angel**

1 Valley affected the participants in October
2 of 2009.

3 **A. I don't think that was my testimony.**

4 **Q.** Let's clear it up. That wouldn't have
5 anything to do with it; correct?

6 **A. Have anything to do with what?**

7 **Q.** You said Mr. Ray was encouraging
8 people -- well, you actually argued with me. But
9 he was saying words. You're more than that. You
10 can do it. You're more than your body, you said.
11 You recall those words; correct?

12 **A. Yes.**

13 **Q.** And people responded. Some people
14 exercised free choice and left. Some people
15 exercised free choice and stayed; correct?

16 **A. Yes. And more.**

17 **Q.** My question is their diet had nothing to
18 do with their free choice. Fair statement?

19 **A. Yes. I don't know what they're thinking,**
20 **though.**

21 **Q.** I agree with that. My question is, it is
22 not your testimony -- if I was mistaken on direct
23 examination -- that the fact that they had a
24 vegetarian diet for five days, that somehow would
25 affect whether or not they stayed inside the sweat

1 lodge or left. Correct?

2 **A. Correct.**

3 **Q.** Now, these other retreat groups that
4 would come to Angel Valley -- did they not also
5 participate in something called a "Vision Quest"?

6 **A. I remember one other group participated**
7 **in a Vision Quest.**

8 **Q.** Weren't there designated sites by Angel
9 Valley where these Vision Quest locations were?

10 **A. For James Ray International they were**
11 **spread out throughout the property. But other**
12 **event that did a Vision Quest -- they were all in**
13 **the confines of the property. They were, like, all**
14 **within -- like on the photo where you show the**
15 **grounds, they were all within that. And James**
16 **Ray's were all out of that area. It was different.**

17 **Q.** So for James Ray International they were
18 off the private property, onto the United States
19 Forest Service land; correct?

20 **A. I don't know whose land it was. I'm**
21 **telling you that --**

22 **Q.** Further out?

23 **A. Yes.**

24 **Q.** And did you know that Angel Valley
25 selected those sites?

1 **A. Yes.**

2 **Q.** So not James Ray International; correct?

3 **A. Yes.**

4 **Q.** Not James Ray; correct?

5 **A. One year they did go out with them. But**
6 **I don't know if they were picking them. You know**
7 **what I mean? They all went together and picked**
8 **sites.**

9 **Q.** Let me rephrase me question. You never
10 saw James Ray, the person, go out and select a site
11 for the Vision Quest; correct?

12 **A. Correct.**

13 **Q.** There may have been other employees of
14 James Ray International that went out to these
15 sites with employees of Angel Valley?

16 **A. Yes. That's how you asked it the first**
17 **time.**

18 **Q.** Right.

19 I want to make something else clear. You
20 built -- you, along with your husband, actually
21 built the structure that was used in October
22 of 2009; correct?

23 **A. I helped build it. Yes.**

24 **Q.** James Ray was never there; correct?

25 **A. When I built the sweat lodge? Correct.**

1 **Q.** James Ray International was not present,
2 any employee of James Ray International was not
3 present, when you helped build the sweat lodge;
4 correct?

5 **A. Correct.**

6 **Q.** And that's true for each of the years
7 that you've talked about -- 2007, 2008, 2009 --
8 correct?

9 **A. Correct.**

10 **Q.** You knew that that was a service provided
11 by Angel Valley to James Ray International;
12 correct?

13 **A. Yes.**

14 **Q.** When you built the sweat lodge, the first
15 time you helped build it was in 2007; correct?

16 **A. Are you talking about the structure or --**

17 **Q.** I'm talking about the actual structure.

18 **A. Yes.**

19 **Q.** And during that year, it's my
20 understanding that Gary Palisch was the guy in
21 charge of constructing the lodge. Correct?

22 **A. No.**

23 **Q.** Well, Ms. Mercer, you've been interviewed
24 by various police detectives in the Yavapai County
25 Sheriff's Office throughout the pendency of this

1 matter; correct?
 2 **A. Yes.**
 3 **Q.** And you recall telling them you helped
 4 build the lodge in 2008?
 5 **A. Yes.**
 6 **Q.** And that was the first time that you had
 7 ever personally build the sweat lodge?
 8 **A. Yes.**
 9 **Q.** That you received an email from Angel
 10 Valley that told you how they wanted the sweat
 11 lodge constructed?
 12 **A. That was in 2007, I think. Wasn't it?**
 13 **Q.** Well, you told the detectives 2008. I
 14 just want your recollection.
 15 **A. Yeah. I got an email.**
 16 **Q.** And that email -- my point is that email
 17 came from Angel Valley and had specific
 18 instructions on how to construct the sweat lodge.
 19 Correct?
 20 **A. Yes.**
 21 **Q.** You had never built one?
 22 **A. That was -- okay. Can I clear it up. It**
 23 **was building the lodge, not -- you confused me.**
 24 **You're saying building the sweat lodge. I thought**
 25 **you were talking about building the kiva structure,**

1 **tying the wood together. And you're just talking**
 2 **about putting the blankets on that in 2008. And**
 3 **that is -- is that what you're asking, about**
 4 **putting the blankets on?**
 5 **Q.** No. I'm asking you about the sticks.
 6 **A. Okay.**
 7 **Q.** When did you first build a sweat lodge is
 8 my question? 2007 or 2008?
 9 **A. 2008.**
 10 **Q.** And the first time that you were ever
 11 asked to help construct a sweat lodge was the first
 12 time that you had ever done that; correct?
 13 **A. Yes.**
 14 **Q.** And you were sent an email from Angel
 15 Valley instructing you on how to build part of this
 16 sweat lodge; correct?
 17 **A. No. See, that was the email that -- for**
 18 **us to -- told us how to put the blankets on.**
 19 **Q.** Okay.
 20 **A. And what you're asking -- what I think**
 21 **you're asking about is when we put the sticks**
 22 **together. And those were two different times.**
 23 **I never got an email telling us from**
 24 **Angel Valley how to put the sticks together. We**
 25 **got an email telling us how to put the blankets on.**

1 **Q.** Here's my point: You had never built a
 2 sweat lodge?
 3 **A. No.**
 4 **Q.** You apparently received an email from
 5 Angel Valley about how to put the blankets on;
 6 correct?
 7 **A. Yes.**
 8 **Q.** And you also did internet research on
 9 Google to find out how to build a sweat lodge;
 10 correct?
 11 **A. To put the blankets on. Yes.**
 12 **Q.** Who taught you how to put the sticks on?
 13 **A. The people that were there.**
 14 **Q.** Who was that?
 15 **A. The people Angel Valley hired.**
 16 **Q.** Was that Gary?
 17 **A. No. Gary was the general manager at the**
 18 **time. But Gary had no direction in telling us how**
 19 **to build the sweat lodge other than James Ray**
 20 **needed a sweat lodge for 75 people. That's what**
 21 **Gary said. And then the rest came from the people**
 22 **that helped us put the sticks together and cut the**
 23 **sticks. You understand what I'm saying?**
 24 **Q.** First time you ever built a sweat lodge
 25 was 2008? You personally; correct?

1 **A. Put the blankets on or put the sticks**
 2 **together? There is two different things. And**
 3 **there are two different times. The first time I**
 4 **put the blankets on was 2007. And that's when we**
 5 **got the email. The first time I made the sticks --**
 6 **Q.** 2008?
 7 **A. 2008.**
 8 **Q.** So when you put the sticks on in 2008,
 9 you looked at Google on internet to find out how to
 10 do it?
 11 **A. No, I did not.**
 12 **Q.** 2007 now?
 13 **A. When we were learning how to put the**
 14 **blankets on. Because they were --**
 15 **Q.** Here's my point: So you're the one
 16 responsible for building the stick structure?
 17 **A. I helped.**
 18 **Q.** In 2008?
 19 **A. Yes. I helped put the sticks together.**
 20 **Q.** You and your husband; correct?
 21 **A. And other people. Yes.**
 22 **Q.** And that stick structure was built over a
 23 hole in the ground; correct?
 24 **A. Yes.**
 25 **Q.** What do you call that hole?

1 **A. A hole.**
 2 **Q.** Okay. So it doesn't have a special name.
 3 The sticks are called the "kiva"?
 4 **A. Yes. And I don't know if it's correct**
 5 **Native American. So these are just the terms I'm**
 6 **familiar with. The sticks put together is what I**
 7 **know as the kiva structure.**
 8 **Q.** When you're building the kiva structure
 9 over the hole, you know that the hot rocks are
 10 going to be placed in the hole; correct?
 11 **A. Yes.**
 12 **Q.** You know that when the sticks -- when
 13 you're constructing the sticks, you know that later
 14 on you're going to put some covering over it;
 15 correct?
 16 **A. Yes.**
 17 **Q.** Did anyone emphasize to you how important
 18 it might be that the hole be placed exactly in the
 19 middle of the kiva?
 20 **A. No.**
 21 **Q.** Did anyone emphasize to you how important
 22 it might be to make sure you have the right size of
 23 door to enter or leave the sweat lodge?
 24 **A. I wasn't -- no.**
 25 **Q.** Now, what you do know is that

1 Detective Diskin told you on October 19 that he
 2 can't think of any reason why you and your husband
 3 would be criminally liable for anything but you
 4 should get a civil attorney; correct?
 5 **A. I remember he said we should get a**
 6 **lawyer. Yes.**
 7 MR. KELLY: May I approach, Judge?
 8 THE COURT: Yes.
 9 **Q.** BY MR. KELLY: Ma'am, let me hand you
 10 what's been marked as for identification as 677
 11 and ask you to turn to page 3, lines 16 and 17.
 12 MS. POLK: Counsel, can you tell me what you
 13 just handed her.
 14 MR. KELLY: 677.
 15 (Pause in proceedings.)
 16 **Q.** BY MR. KELLY: Did you get a chance to
 17 look at that, Ms. Mercer?
 18 **A. What do you want me to look at? 16?**
 19 **Q.** I want you to look at page 3, lines 16
 20 and 17.
 21 **A. Yes, sir.**
 22 **Q.** You recall -- after reviewing that, does
 23 it refresh your recollection that Detective Diskin
 24 said I don't see any reason why you guys would be
 25 criminally liable for anything?

1 **A. Okay.**
 2 **Q.** But he did advise you to get a civil
 3 attorney; correct? You just told us that.
 4 **A. Yes. Well, he --**
 5 **Q.** And your civil attorney is in the
 6 courtroom today; correct?
 7 **A. Yes.**
 8 **Q.** You were the one that built the sweat
 9 lodge, the kiva, and put the blankets on; correct?
 10 **A. Yes.**
 11 **Q.** And I asked you questions about the
 12 location of the pit in the middle. And you, then,
 13 when you built -- you and your husband built the
 14 structure itself, the kiva, you were the ones that
 15 determined how tall it would be; correct?
 16 **A. No. Not me or my husband did that.**
 17 **Q.** Someone else?
 18 **A. Yes.**
 19 **Q.** Who? Angel Valley?
 20 **A. The other people that were there telling**
 21 **us how to do it.**
 22 **Q.** Let's make it clear to the jury --
 23 **A. We don't know how to do it. I don't know**
 24 **how to build it or where to put a hole.**
 25 **Q.** You looked on the internet to do some

1 research --
 2 **A. No. You're mistaken with that.**
 3 **Q.** Let me ask you this question: James Ray
 4 was not present when you were putting the kiva up
 5 over the hole; correct?
 6 **A. Correct.**
 7 **Q.** There was no employees from James Ray
 8 International present when you were putting the
 9 kiva up; correct?
 10 **A. Yes.**
 11 **Q.** And on October 19, 2009, after this
 12 accident, Detective Diskin said, we're not looking
 13 at you guys criminally; correct?
 14 **A. Yes.**
 15 **Q.** But you should get a civil attorney;
 16 correct?
 17 **A. I just heard attorney. I didn't know the**
 18 **difference between civil or criminal at that point.**
 19 **I heard attorney.**
 20 **Q.** And you have an attorney in the
 21 courtroom; correct?
 22 **A. Yes.**
 23 **Q.** Now I ask you a question. James Ray
 24 International did not determine in 2008 how tall
 25 that sweat lodge was; correct?

1 **A. Not that I'm aware of.**
 2 **Q.** James Ray did not determine how tall the
 3 sweat lodge was; correct?
 4 **A. Not that I'm aware of.**
 5 **Q.** You, your husband and the other people
 6 from Angel Valley made that determination; correct?
 7 **A. I did not make that determination. But**
 8 **yes. The people there. Yes.**
 9 **Q.** In fact, Detective Diskin in that
 10 interview asked you, you put the sticks together,
 11 you put the tarps on, and you put the rocks in;
 12 correct?
 13 **A. Correct.**
 14 **Q.** And you agreed with that?
 15 **A. I did.**
 16 **MR. KELLY:** If we could take a look at
 17 Exhibit 242.
 18 **Q.** Is this some of the people that helped
 19 you?
 20 **A. Yes.**
 21 **Q.** And can you identify them today?
 22 **A. Yes.**
 23 **Q.** Who are they?
 24 **A. My husband, Ted.**
 25 **Q.** Where is he?

1 **A. Right here.**
 2 **Anita. And that's the other fellow.**
 3 **Q.** Gary?
 4 **A. No. That's not Gary.**
 5 **Q.** Who is that?
 6 **A. I don't remember his name. I think he**
 7 **came up from -- I don't remember his name. He came**
 8 **for -- to build the sweat lodge. Or to build the**
 9 **kiva. Sorry.**
 10 **Q.** I'm going to put up -- just as an
 11 example, Ms. Do would put up 146 in evidence.
 12 Take a look at this, Ms. Mercer. That's
 13 a picture of a completed sweat lodge in 2009;
 14 correct?
 15 **A. I don't know that that was 2009. It's a**
 16 **completed sweat lodge.**
 17 **Q.** Have any reason to dispute it's 2009?
 18 **A. Yes. It doesn't look like the -- are you**
 19 **saying that's the James Ray International one?**
 20 **There is no tarp. I mean, there is no shade**
 21 **canopy. I think --**
 22 **Q.** Do you see the people with the blue
 23 T-shirts?
 24 **A. Yes, I do.**
 25 **Q.** Are they Dream Team members for James Ray

1 International?
 2 **A. Yes.**
 3 **Q.** And my question is is that a completed
 4 sweat lodge?
 5 **A. Yes.**
 6 **Q.** That's one you and your husband would
 7 have built in some year; correct?
 8 **A. Yes.**
 9 **Q.** And do you have any reason to disagree
 10 that's 2009?
 11 **A. Doesn't look like it did.**
 12 **Q.** Do you think it looks like 2008?
 13 May I approach the witness?
 14 **THE COURT:** You may.
 15 **Q.** BY MR. KELLY: Ms. Mercer, let me hand
 16 you the actual photograph. Sometimes it's easier
 17 to see.
 18 It's been 18 months; correct?
 19 **A. Uh-huh.**
 20 **Q.** So some things aren't absolutely clear;
 21 correct? It's been a while since this accident in
 22 October of 2009; correct?
 23 **A. Yes.**
 24 **Q.** And, as you sit here today, you don't
 25 know whether that's the 2009, 2008 or 2007 sweat

1 lodge; correct?
 2 **A. From the way the picture is taken, I**
 3 **can't tell what year that picture is.**
 4 **Q.** What I want to ask you is -- take a look
 5 at the Exhibit 146. Do you see the big rubber cap?
 6 **A. Yes, I do.**
 7 **Q.** You and your husband put that over sweat
 8 lodges during those years?
 9 **A. Yes, we did.**
 10 **Q.** Do you see some other tarps on the left
 11 that are brown in color?
 12 **A. Yes.**
 13 **Q.** Now, I'd like to go back to 242. And
 14 this is a picture of your construction of the kiva
 15 in 2008; correct?
 16 **A. Yes.**
 17 **Q.** Now, Ms. Do is going to blow up a portion
 18 of an item. Take a look at the screen here. Do
 19 you see that plastic tarp that's underneath the
 20 sweat lodge?
 21 **A. Yes.**
 22 **Q.** Did you know that was there?
 23 **A. I think I did. Yes.**
 24 **MR. KELLY:** And may we go back out?
 25 **THE WITNESS:** I think it was for weeds.

1 Q. BY MR. KELLY: I can see it on the bottom
2 here.
3 A. Yes.
4 Q. See all the places where it's coming up?
5 A. Yes.
6 Q. And, like I said, that would be very
7 effective weed control; correct?
8 A. Yes.
9 Q. Also when you have that plastic tarp on
10 the bottom and you have that rubber cap deal on top
11 with rocks, that would seal that sweat lodge;
12 correct?
13 A. Correct. But I don't think that was
14 plastic. It was that fabric kind of material. It
15 wasn't plastic.
16 Q. Listen to my question.
17 A. Yes.
18 Q. That's that plastic that's used for weed
19 control. And it's under the sweat lodge. And the
20 rubber cab deal, as your husband described it, is
21 on top over your kiva. And then you put those big
22 rocks around the edge.
23 That would seal everything pretty tight;
24 correct?
25 A. Yeah. But more dirt was put on after --

1 they put more dirt on this area.
2 Q. Now, Ms. Mercer --
3 A. But yeah. That would. I mean --
4 Q. Were you aware that last week we received
5 an expert report that criticized the construction
6 of the sweat lodge?
7 MS. POLK: Your Honor, objection. There is no
8 foundation.
9 THE COURT: Sustained.
10 THE WITNESS: No. You received a report --
11 THE COURT: The objection is sustained. You
12 don't need to answer that.
13 MR. KELLY: Judge, may I approach?
14 THE COURT: We'll go ahead and take the noon
15 recess, ladies and gentlemen. Please be
16 reassembled at 1:30. Remember the admonition.
17 Follow it in all respects, of course.
18 Ms. Mercer, you will be excused at this
19 time as well. Remember the rule of exclusion.
20 Parties will remain a moment.
21 (Proceedings continued outside presence
22 of jury.)
23 THE COURT: The record will show the jury and
24 the witness have left the courtroom. And Ms. Polk
25 had made an objection. I sustained it.

1 Mr. Kelly, you wanted to approach?
2 MR. KELLY: Perhaps I misstated. Maybe it
3 wasn't last week. Maybe it was the end of the
4 previous week. But we received the disclosure of
5 the expert witness, disclosed by the state,
6 Mr. Richard Haddow, who did, in fact, criticize the
7 construction of the sweat lodge.
8 So I definitely have a good-faith basis
9 to ask that question of this witness. So I'm not
10 sure the basis of the objection. But I clearly
11 have a good-faith basis. I know this Court has a
12 copy of Mr. Haddow's report. And it indicates the
13 construction of the sweat lodge was a contributing
14 factor to the deaths of the three individuals. And
15 this is the lady that built it.
16 THE COURT: Ms. Polk objected about
17 foundation. I'm just looking at the question now.
18 Ms. Polk.
19 MS. POLK: Your Honor, first of all, this
20 witness would have no personal knowledge of that.
21 The rule clearly indicates you don't ask questions
22 of a witness that are rhetorical in nature only.
23 Secondly, that report is hearsay. So the
24 state would ask does the defense intend to call
25 Mr. Haddow to give his opinions and lay proper

1 foundation for that report?
2 Third, I think it's a mischaracterization
3 of the report to characterize it as criticizing the
4 construction of the sweat lodge. The subsequent
5 interview that the parties had of Mr. Haddow, I
6 believe, we will be discussing later. But -- I'll
7 leave it at that for now, Your Honor. But the
8 question would be that report is hearsay, and does
9 the defense intend to call Mr. Haddow as a witness?
10 THE COURT: Mr. Kelly.
11 MR. KELLY: Judge, this is cross-examination.
12 It's unlimited in the state of Arizona. We've been
13 to this rodeo before. All I have to have is a
14 good-faith basis to ask the question. And I have a
15 very good basis to ask it. It's the state's late
16 disclosed reported expert, Mr. Haddow.
17 And if I perhaps used the wrong
18 terminology, I can rephrase the question to were
19 you aware that there is an expert who opined that
20 the construction of the sweat lodge was a
21 contributing factor in the cause of death, which
22 would be more accurate, and not use the word
23 "criticize."
24 Again, Judge, it's cross-examination. I
25 have good-faith basis to ask it. It's the state's

1 own report. And whether -- I can tell you we did
2 not intend to call Mr. Haddow. He was not
3 disclosed timely as a witness in this case. We
4 understand your court order. He can't testify.
5 But I'm still entitled to ask the question.

6 THE COURT: I didn't say he could not testify
7 if the defense chose to call him.

8 MR. KELLY: Well, Judge, when -- I understood
9 a clear order from this Court a couple weeks ago
10 that the time for investigation is ended. And if
11 we're provided the option of calling him, I
12 appreciate that. But as we stand here today, I
13 don't want to mislead the Court. We had the chance
14 to interview him. But we don't intend to call him.

15 THE COURT: Well, I wanted it clear that this
16 was an unusual circumstance. And we continued the
17 trial. And if you want to call an expert, you were
18 and are given that opportunity.

19 But with regard to the objection -- I've
20 said this before -- I don't believe it is
21 appropriate to call a witness without knowledge in
22 order to make statements to that witness and,
23 essentially, get them before the jury. There can
24 be questions about knowledge of a report. If the
25 person doesn't know there is a report, then -- and

1 doesn't have knowledge of it, just bringing in the
2 evidence in that fashion through a witness without
3 knowledge, it's not something I've really seen to
4 any large extent.

5 Ms. Polk.

6 MS. POLK: Your Honor, particularly because it
7 is hearsay in the fashion that Mr. Kelly asks that
8 question. The only way he can prove it is by
9 bringing in Mr. Haddow. He has to have a
10 good-faith basis that he can prove up the
11 information that he's trying to give to the jury.
12 He can only prove up that information by calling
13 Mr. Haddow.

14 It is improper to be asking this witness
15 a question without the good-faith basis that he
16 will offer up, that he will prove up, the
17 information to the jury.

18 And, Your Honor, I just want to correct
19 something that Mr. Kelly said. He just said again
20 that Mr. Haddow was the state's expert and that he
21 gave us an opinion. The defense continues to
22 misrepresent what occurred. We never retained
23 Mr. Haddow. He gave us the information. He
24 admitted freely to the defense that he was trying
25 to get a job with the state and sent us that email

1 unsolicited. So for Mr. Kelly to continue to call
2 this person the state's expert is not accurate.

3 And finally if --

4 MR. KELLY: I'll put an end to that. I agree
5 with that. I misspoke.

6 MS. POLK: And if Mr. Haddow's information is
7 exculpatory, perhaps the defense would like to call
8 him at trial.

9 THE COURT: Well, first of all, I don't think
10 the prove up requires absolutely admissible
11 testimony. It requires a good-faith basis. We
12 talked about this in the context of another
13 witness, and I didn't get any additional law on a
14 good-faith basis. I recall looking at it. In
15 Arizona it is recognized it a basic doctrine.

16 So, first of all, Ms. Polk, I don't
17 believe there has to be absolute admissible
18 testimony if they have a valid prove up.

19 But at the same time, though, Mr. Kelly,
20 questions to a witness without knowledge, to just
21 convey statements of fact, I find to be
22 inappropriate. And we're going to take a lunch
23 recess. And if you think there is law to the
24 contrary, that's fine.

25 There can be questions about knowledge of

1 a report coming in about this subject if she has
2 knowledge. But if she does not have knowledge,
3 certainly further questions would be only an avenue
4 of bringing in hearsay and inadmissible testimony.

5 MR. KELLY: But, Judge, am I permitted to ask
6 her questions about the construction of the sweat
7 lodge?

8 THE COURT: Ms. Polk --

9 Before I say that, you have been, as a
10 matter of fact.

11 MR. KELLY: Including its deficiencies? She
12 can answer however she knows it or not.

13 THE COURT: Ms. Polk, go ahead.

14 MS. POLK: I think that Mr. Kelly can ask
15 questions of the witness about her knowledge of the
16 construction of the sweat lodge. But to suggest
17 that there is a report out there that says that
18 there are deficiencies with the construction would
19 be a mischaracterization of what that report is and
20 a mischaracterization of what the defense knows
21 Mr. Haddow would testify to if he took the stand.

22 But he can ask questions of the witness
23 about the construction but cannot mischaracterize
24 the construction suggesting there is a report out
25 there that says something that it doesn't say.

1 MR. KELLY: Judge, what's improper in this
2 case is the clear Brady violation you found. And
3 we're trying to deal it mid trial. We've requested
4 jury instructions, some remedy that allows my
5 client a fair trial.

6 What I would ask permission to do is ask
7 this question to the witness regarding the
8 construction of the sweat lodge. And yes. I will
9 be relying on the opinions of Mr. Haddow in asking
10 those questions. And she's free to answer however
11 she chooses.

12 THE COURT: There cannot be assertion that
13 this is a fact. There is really an expert out here
14 that says this, and don't you know that this is
15 what this expert says? You can ask about aspects
16 of construction. That's absolutely a legitimate
17 topic. Aspects of construction and whether or not
18 this or that might be important or not. All those
19 things.

20 But, basically, certifying that this
21 expert has made specific criticism and just
22 asserting that in a fashion, again, particularly
23 with a witness who may not have any knowledge of
24 that. But I don't know that that question has been
25 asked.

1 Ms. Polk.

2 MS. POLK: And, Your Honor, just by way of
3 example, Mr. Kelly asked a question about the
4 off-center pit. What Mr. Haddow would testify to
5 if he took the stand in this trial is that the
6 off-center pit -- that the heat coming from this
7 pit creates a heat barrier. His testimony is that
8 people who are closest to that heat barrier suffer
9 more than the those further away, which, again,
10 kind of obvious.

11 He would testify if that pit had been
12 centered instead of toward the back, the heat
13 barrier would be even greater and that more people
14 would have been subject to greater heat. So to
15 mischaracterize that off-center pit as somehow a
16 deficiency in the sweat lodge that created -- that
17 caused people to die that otherwise would not have
18 died is a complete mischaracterization of what
19 Mr. Haddow would say.

20 If the pit had been centered, he will
21 testify there would have been a greater heat
22 barrier created by that pit and the rocks.

23 MR. KELLY: Judge, I disagree.

24 THE COURT: I think I made clear there can be
25 questions about construction, whether or not

1 something might be important in this person's view.
2 Anybody who built the sweat lodge can be questioned
3 on those matters.

4 Mr. Li.

5 MR. LI: Briefly, Your Honor. I'm not going
6 to address this particular point. But I did
7 want -- the state has made several representations
8 about what the relationship between Mr. Haddow and
9 the state has been. We have filed and we urge the
10 Court to read a motion relating to exactly that
11 issue. It has a lot of detail in it, and it is
12 based on documents late provided by the state or by
13 Mr. Haddow relating to that relationship.

14 And it details a relationship that starts
15 12 days after the accident and continues all the
16 way through the time where they listed Mr. Haddow
17 as an expert.

18 THE COURT: I was looking for that document.

19 MR. LI: It's filed downstairs and has been
20 served on Kathy, I believe, as has the 404(b)
21 supplemental brief. Those two briefs should be
22 with the Court.

23 And we would urge, particularly with
24 respect to the representations that the state's
25 currently making about the relationship that's

1 detailed in the brief. And also the 404(b) brief
2 also has been filed.

3 THE COURT: I've got the filing concerning the
4 tax question. I have that.

5 Have those others been provided to my
6 office now?

7 MR. LI: Yes, Your Honor.

8 THE COURT: Then I'll get them.

9 MR. LI: If they haven't, let us know. We'll
10 make a courtesy copy.

11 THE COURT: The clerk's office is not able to
12 image because of a technical issue. So I'm not
13 getting things.

14 MS. POLK: Your Honor, we haven't received
15 anything either if it's via email or email is down.

16 MR. LI: We've given it to Kathy Durrer in
17 person.

18 Just so the Court is clear, there should
19 be three filings from the defense.

20 THE COURT: Thank you. We will be in recess.

21 MR. LI: Thank you.

22 (Recess.)

23 (Proceedings continued in the presence of
24 jury.)

25 THE COURT: The record will show the presence

1 of the defendant, Mr. Ray; the attorneys, and the
 2 jury. Ms. Mercer is on the witness stand.
 3 Mr. Kelly.
 4 MR. KELLY: Thank you, Judge.
 5 Q. Ms. Mercer --
 6 Could we get Exhibit 242.
 7 We had blown up a portion of Exhibit 242
 8 that shows some type of lining under the sweat
 9 lodge.
 10 Do you recall that question and your
 11 answers right before lunch?
 12 A. Yes.
 13 Q. And you don't have a specific
 14 recollection as to what that material is today;
 15 correct?
 16 A. I do.
 17 Q. You told us you thought it was some
 18 breathable material?
 19 A. It's that fabric type of barrier.
 20 Q. One thing you do know, Ms. Mercer, is
 21 Mr. Diskin, Detective Diskin, or anyone else from
 22 the State of Arizona, has never asked you any
 23 questions about what that material is; correct?
 24 A. Correct.
 25 Q. They didn't ask you to help them retrieve

1 a sample of that material so they could conduct an
 2 analysis in the DPS crime lab; correct?
 3 A. Correct.
 4 Q. And Exhibit 242 clearly shows some type
 5 of lining underneath the sand, which is the bottom
 6 of the sweat lodge; correct?
 7 A. Correct.
 8 Q. Now, right before lunch I was asking you
 9 some questions about the construction of the sweat
 10 lodge. And you do not know, ma'am, whether or not
 11 the construction that you and your husband
 12 completed on the sweat lodge created a heat
 13 barrier; correct?
 14 A. Can you rephrase that.
 15 Q. As you sit here today, you don't know
 16 whether or not due to your construction the sweat
 17 lodge in 2009 created a heat barrier on the
 18 interior of the sweat lodge; correct?
 19 A. Correct.
 20 Q. You don't know whether or not the sweat
 21 lodge, due to your construction of the sweat lodge
 22 in 2009, it prevented the proper circulation of air
 23 inside the sweat lodge; correct?
 24 A. Correct.
 25 Q. You don't know whether the construction

1 of the sweat lodge in 2009 increased carbon dioxide
 2 buildup inside the sweat lodge during its use;
 3 correct?
 4 A. Correct.
 5 Q. And you don't know whether your
 6 construction of the sweat lodge in 2009 created the
 7 buildup of toxins inside the sweat lodge during its
 8 use in October of 2009; correct?
 9 A. Correct.
 10 Q. And here's something that's important,
 11 Ms. Mercer: The State of Arizona never asked you
 12 those questions, did they?
 13 A. The questions you just asked me, no.
 14 Q. The State of Arizona never asked you any
 15 questions about your -- you and your husband's
 16 construction of the sweat lodge; correct?
 17 A. They asked about the construction of the
 18 sweat lodge.
 19 Q. I'm going to rephrase my question. They
 20 did not sit down and specifically discuss with you
 21 whether or not your construction of the sweat lodge
 22 may have contributed to the deaths of the three
 23 individuals; correct?
 24 A. Correct.
 25 Q. They told you almost immediately in

1 October that you should get a civil attorney;
 2 correct?
 3 A. No.
 4 Q. You saw your transcript right before
 5 lunch; correct?
 6 A. Yes.
 7 Q. And Detective Diskin said we're not going
 8 to investigate you criminally, but you ought to get
 9 an attorney; correct?
 10 A. Correct.
 11 Q. Now, on direct you said that -- this is
 12 not an exhibit, Ms. Mercer. It's a chart that your
 13 husband and Mr. Li went over during his testimony.
 14 Okay?
 15 A. Okay.
 16 Q. It's not in evidence. You told us on
 17 direct that the materials used for the sweat lodge
 18 in 2008 were the same materials used in 2009;
 19 correct?
 20 A. Yes.
 21 Q. If you want to look at that chart. Is it
 22 your testimony that the frame or the kiva was
 23 identical between 2007 and 2008?
 24 A. To my knowledge, yes.
 25 Q. And when you say, to your knowledge, it's

1 because you can only testify based on your personal
2 observations; correct?

3 **A. Sure.**

4 **Q.** In other words, there are times that you
5 were not present at Angel Valley; correct?

6 **A. Absolutely.**

7 **Q.** And during those times you were not
8 present, other things could have happened?

9 **A. Yes.**

10 **Q.** That you don't know about; correct?

11 **A. Yes.**

12 **Q.** The second thing in regards to tarps used
13 on the sweat lodge, you would agree with me that
14 the big brown rubber deal that we were looking
15 at -- I think it's exhibit --

16 **A. I know what you're talking about.**

17 **Q.** We'll show the jury. It's Exhibit 146.
18 The big round tarp on top was used both in 2008
19 and 2009; correct?

20 **A. Yes, it was.**

21 **Q.** You also believe that some of the
22 blankets which are placed on the sweat lodge under
23 that big brown rubber tarp are probably the same
24 between 2008 and 2009; correct?

25 **A. I know that. Yes.**

1 **Q.** But you don't know whether additional
2 blankets were used in either one of those years
3 because you're not in Angel Valley continuously;
4 correct?

5 **A. Correct.**

6 **Q.** So you recognize what you believe to be
7 the same blankets; correct?

8 **A. Yes.**

9 **Q.** Then the next item were the stones. And
10 the stones are not the same rocks used between the
11 two years; correct?

12 **A. No.**

13 **Q.** That's correct; right?

14 **A. Correct.**

15 **Q.** And it is because once they're used,
16 they're not used a second time?

17 **A. Correct.**

18 **Q.** The wood necessarily cannot be the same
19 wood because it's burned -- the wood used to heat
20 the rocks; correct?

21 **A. Yes.**

22 **Q.** And then, finally, the location that we
23 talked about where you put up the kivas to the
24 Exhibit 146 is identical; correct?

25 **A. Yes.**

1 **Q.** And the land underneath is identical;
2 correct?

3 **A. To my knowledge, yes.**

4 **Q.** And, as far as you know, that plastic
5 tarp or plastic fabric that was used for what you
6 believe to be weed control was there both in 2008
7 and 2009?

8 MS. POLK: Your Honor, objection.

9 Mischaracterizes the testimony.

10 THE COURT: Sustained.

11 **Q.** BY MR. KELLY: Remember the exhibit with
12 the plastic tarp --

13 **A. I only saw it when we were building it is
14 the only time we saw that.**

15 **Q.** And then you guys covered it up with
16 sand; correct?

17 **A. I didn't, but someone did. Yes.**

18 **Q.** So the participants wouldn't see it when
19 they were participating; correct?

20 **A. Uh-huh.**

21 **Q.** So my question is, as far as you know,
22 that tarp was there in 2009; correct?

23 MS. POLK: Your Honor, objection to
24 characterizing as a tarp or as a plastic.

25 MR. KELLY: I'll rephrase.

1 THE COURT: Okay, Mr. Kelly.

2 **Q.** BY MR. KELLY: Why don't you call it
3 something. And we'll use that word. Okay?

4 **A. The landscape fabric.**

5 **Q.** Okay. So the landscape fabric
6 underneath, as you far as you know, is there in
7 2009; correct?

8 **A. Yes.**

9 **Q.** And, of course, you would agree with me
10 we'll never know what it is because a sample was
11 not taken by the State of Arizona and provided to
12 this jury; correct?

13 **A. Yes.**

14 **Q.** Now, although the same -- or the blankets
15 appear to be the same, you can't testify under oath
16 that they were exactly the same; correct?

17 **A. I can testify that some were exactly the
18 same.**

19 **Q.** Okay. Some were, but some may not have
20 been; correct?

21 **A. Some may not have been.**

22 **Q.** And if we take a look at, as an example,
23 just as an example -- you would agree with me that
24 the layering of the blankets underneath the big
25 brown tarp may not be identical between 2008

1 and 2009; correct?

2 **A. Correct.**

3 **Q.** And I want to show you what's been
4 admitted as Exhibit 245. Now, do you recognize
5 that person in 245?

6 **A. Yes, I do.**

7 **Q.** That's you; correct?

8 **A. Yes, it is.**

9 **Q.** And that's in 2008; correct?

10 **A. Yes, it is.**

11 **Q.** And there is a dog next to you. What's
12 the dog's name?

13 **A. Stormy.**

14 **Q.** Stormy. Is that your dog?

15 **A. Yes.**

16 **MR. KELLY:** I want to ask Ms. Do to blow up
17 your image.

18 **Q.** Do you see those words written on the
19 blankets?

20 **A. Yes.**

21 **Q.** Those blankets are moving blankets;
22 correct?

23 **A. Correct.**

24 **Q.** And they have some -- something written
25 on the side of them; correct?

1 **A. Correct.**

2 **Q.** Now, let's take a look at 2009, as an
3 example, 518.

4 And if we blow up a portion of the blue
5 blankets in 518.

6 I don't see the words. Do you?

7 **A. It was the other side. The other way
8 around, I believe. Because there was --**

9 **Q.** Listen to my question. Okay? I don't
10 see the words. Correct?

11 **A. Correct.**

12 **Q.** And if we take a look at 519? 528.

13 If we take a look at Exhibit 528, which
14 is in evidence, another picture of 2009 interior of
15 the sweat lodge. And it doesn't show those words;
16 correct?

17 **A. Correct.**

18 **Q.** And then Ms. Polk showed you 891, 892 and
19 893, which are photographs of the interior of the
20 sweat lodge; correct?

21 **A. Yes.**

22 **Q.** And when I study all the photographs of
23 the interior of the 2009 sweat lodge, I don't see
24 any words like the words that were present in
25 Exhibit 245. Did you?

1 **A. No, I did not.**

2 **Q.** And I think you're about to tell us that
3 you may have reversed the blankets in 2009.
4 Correct?

5 **A. Correct.**

6 **Q.** But here's my point is, you can't sit
7 here today and tell this jury that the blankets
8 were placed identically between 2008 and 2009;
9 correct?

10 **A. Correct.**

11 **Q.** In fact, these photographs show that;
12 right?

13 **A. Correct.**

14 **Q.** Do you know just off hand what U-Haul
15 blankets are treated with to keep the moths and
16 insects out?

17 **A. No, I don't.**

18 **Q.** Now, you told us that when you
19 volunteered and you worked and your husband worked
20 at Angel Valley, the policy that the Hamiltons had
21 for weed control was to pull them; correct?

22 **A. Yes.**

23 **MR. KELLY:** And maybe we can get a picture.
24 Let's try 867.

25 **Q.** There is a picture of Angel Valley;

1 correct?

2 **A. Yes.**

3 **Q.** You recognize the fire pit; right?

4 **A. Yes.**

5 **Q.** You see the aid station; correct?

6 **A. Yes.**

7 **Q.** And you see the stairway going up the
8 hill?

9 **A. Yes.**

10 **Q.** You see the Porta Pottys behind the aid
11 station?

12 **A. Yes.**

13 **Q.** Now, you told us that -- just using
14 Exhibit 867 as an example, it's not your testimony
15 that you've pulled every weed from the cleared
16 sandy dirt area present in 867; correct? You
17 personally didn't do that; correct?

18 **A. No.**

19 **Q.** What you did on occasion when you were
20 volunteering or helping your husband, you guys
21 would pull weeds; correct?

22 **A. Yes.**

23 **Q.** And you thought or you believed there is
24 a policy at Angel Valley not to use any type of
25 herbicide; correct?

1 **A. Yes.**
 2 **Q.** And you have never used a concoction
 3 which involved mixing salt and water to clean -- to
 4 kill weeds; correct?
 5 **A. No.**
 6 **Q.** You've never done that?
 7 **A. I've never done that.**
 8 **Q.** And so what you remember doing is just
 9 pulling weeds?
 10 **A. Yes.**
 11 **Q.** But you just told us you weren't there
 12 all the time; correct?
 13 **A. Correct.**
 14 **Q.** And Angel Valley had -- excuse me --
 15 numerous employees; correct? Five or six?
 16 **A. Yes.**
 17 **Q.** One of them was the landscaper?
 18 **A. Yes.**
 19 **Q.** What was his name?
 20 **A. Rotillo.**
 21 **Q.** And Rotillo was a guy who worked there
 22 and would do many things, such as take care of the
 23 weeds; correct?
 24 **A. I don't know what his duties were, but**
 25 **mainly they were -- yes. I would imagine.**

1 **Q.** Keep things clean; correct?
 2 **A. Yes.**
 3 **Q.** Because Angel Valley is charging people
 4 money to come to this resort for food and lodging,
 5 and it's got to be clean and neat; correct?
 6 **A. Yes. He did all the rock work and set**
 7 **all those rocks.**
 8 **Q.** And you -- you wouldn't know whether or
 9 not Rotillo -- is that his name?
 10 **A. Correct.**
 11 **Q.** Or some other employee of Angel Valley or
 12 Mr. Hamilton or Mrs. Hamilton used some type of
 13 herbicide to keep these weeds down; correct?
 14 **A. Correct.**
 15 **Q.** You believe there is a policy that there
 16 was only holistic type treatment of plants and
 17 animals; correct?
 18 **A. And people.**
 19 **Q.** And people.
 20 **A. Correct.**
 21 **Q.** They weren't trying to control people,
 22 were they?
 23 **A. No. But we used all natural laundry and**
 24 **things like that.**
 25 **Q.** I see what you mean.

1 **A. For sheets and things.**
 2 **Q.** Let's talk a minute about the pesticides.
 3 You don't have any specific knowledge regarding the
 4 use of pesticides at Angel Valley; correct?
 5 **A. Correct.**
 6 **Q.** Now, you were present when your husband
 7 told Detective Diskin in 2009 the only thing
 8 different is the rat poisoning. You heard that;
 9 correct?
 10 **A. I don't remember that. No.**
 11 **MS. POLK:** Your Honor, objection. That
 12 misstates the testimony of Mr. Mercer.
 13 **THE COURT:** Sustained.
 14 **MR. KELLY:** Your Honor, can we play clip 2,
 15 which is -- I'll get the exhibit number.
 16 **MS. POLK:** Your Honor, before we play that,
 17 I'm not even sure what --
 18 **THE COURT:** Mr. Kelly.
 19 **MR. KELLY:** I'm sorry. Clip 2 on Exhibit 631.
 20 **MS. POLK:** Your Honor, Exhibit 631 is not in
 21 evidence.
 22 **THE COURT:** Okay.
 23 **Mr. Kelly,** do you have a transcript?
 24 **MR. KELLY:** I do.
 25 **THE COURT:** That's the normal way to proceed.

1 **MR. KELLY:** I have a clip from the transcript
 2 that I'd ask to be played so that -- this witness
 3 was present when the statement was made. I won't
 4 be mischaracterizing anything. It's what the
 5 actual conversation was. It's on page 10 through
 6 page 11.
 7 **THE COURT:** Ms. Polk, do you have the
 8 transcript?
 9 **MS. POLK:** I do, Your Honor. May I have a
 10 moment?
 11 **THE COURT:** Yes.
 12 **MS. POLK:** Counsel, could you give me line
 13 numbers.
 14 **MR. KELLY:** Could I have a moment, Judge?
 15 **THE COURT:** Yes.
 16 **MR. KELLY:** Your Honor, I misspoke. That clip
 17 does not say --
 18 **May I rephrase my question?**
 19 **THE COURT:** You may.
 20 **Q.** BY MR. KELLY: Did you, Ms. Mercer, hear
 21 your husband make a mention of rat poisoning in the
 22 pump house to Detective Diskin during your joint
 23 interview?
 24 **A. I don't remember that.**
 25 **Q.** Did you hear your husband make mention

1 of -- to say something to the effect the only thing
2 different was the wood we used this year?

3 **A. I read that. But I don't remember it**
4 **personally.**

5 MR. KELLY: Now, Your Honor, I'd ask to play
6 Clip No. 2 from Exhibit 631. And it's page 10,
7 line 8, through page 28, line 11.

8 MS. POLK: Your Honor, this appears to be the
9 same clip that was played for the jury during
10 Mr. Mercer's testimony. And the state has no
11 objection to entering into evidence the transcript
12 of that entire interview.

13 MR. KELLY: Judge.

14 THE COURT: Mr. Kelly.

15 MR. KELLY: Using it to impeach and refresh
16 her recollection. I object to its admission, but I
17 would ask it be played.

18 THE COURT: That clip can be played.

19 MS. POLK: Your Honor.

20 THE COURT: Yes, Ms. Polk.

21 MS. POLK: Exhibit 631, I believe, is the --

22 MR. KELLY: 630. I stand corrected.

23 MS. POLK: 630 was marked as an exhibit --

24 THE COURT: Before we play it, I want to make
25 sure -- please stop. If there is a question, I

1 want to deal with it.

2 Ms. Polk, please continue.

3 MS. POLK: Your Honor, the exhibit is 630.
4 And I believe it's the entire interview that
5 occurred. It was conducted by Detective Edgerton.
6 And this is at the hospital. And it's both Ted and
7 Debby Mercer are interviewed. And what counsel is
8 playing now is just a limited clip that I do
9 believe is identified as a separate exhibit. I
10 believe it should be. If clips are going to be
11 played, they should be identified. But, again, the
12 state has no objection to having the entire audio,
13 630, admitted as an exhibit in this trial.

14 THE COURT: Mr. Kelly at this time is
15 offering --

16 MR. KELLY: I'd object to it's admission.
17 It's cumulative. In regards to marking, we have no
18 objection. I'd ask that the clip be played in
19 regards to my cross-examination. And we'll make
20 sure it's marked before the end of the day if it's
21 not.

22 THE COURT: Ms. Polk.

23 MS. POLK: And, Your Honor, that is my concern
24 is that the court reporter doesn't take down these
25 clips. And so there is no record, then, of what is

1 exactly is being played because the entire audio is
2 marked and not these individual clips.

3 MR. KELLY: We'll mark it.

4 MS. POLK: And I have no objection to it being
5 played. I just want to make sure it's being
6 referenced.

7 THE COURT: Okay. Then it will be marked.
8 And it also has to be designated so that it's clear
9 what portion of it is being played.

10 MR. KELLY: For right now I ask that it just
11 be assigned the next number in sequence, and we'll
12 refer to it as such.

13 THE COURT: Okay.

14 THE CLERK: 895.

15 THE COURT: 895. So this portion of 895 will
16 be admitted. And it corresponds to what page and
17 line numbers?

18 MR. KELLY: It corresponds to Exhibit 630,
19 transcript of which is 631. And it's page 10,
20 line 8, through page 11, line 28.

21 (Exhibit 895 admitted.)

22 (Exhibit 895 played.)

23 **Q.** BY MR. KELLY: Now, Ms. Mercer, my
24 question was you were present -- let me back up.
25 You recognized your husband's voice on that audio

1 clip?

2 **A. Yes.**

3 **Q.** And you were present during that
4 interview?

5 **A. Yes.**

6 **Q.** And does that refresh your recollection
7 as to the discussion regarding the type of wood
8 that was used during 2009?

9 **A. Yes.**

10 **Q.** And that was -- you would agree with your
11 husband that it was a different type of wood, and
12 he expressed the concerns which we just heard;
13 correct?

14 **A. I didn't have anything to do with the**
15 **wood. So whatever he said.**

16 **Q.** You heard it; correct?

17 **A. Yes.**

18 **Q.** Now, take a look at Exhibit 6 -- excuse
19 me. 867. Again, here's my point: You're not at
20 Angel Valley all the time; correct?

21 **A. Correct.**

22 **Q.** And the wood that was used to heat the
23 rocks and the sweat lodge in 2009 was provided to
24 you and your husband by Angel Valley; correct?

25 **A. Correct.**

1 Q. And you told us about a policy not to use
2 herbicides at Angel Valley; correct?
3 A. **Correct.**
4 Q. And try to make things as natural as
5 possible; correct?
6 A. **Correct.**
7 Q. And we can see in Exhibit 867 some steps
8 in the background. Do you see those?
9 A. **Yes.**
10 Q. That's treated wood; correct?
11 A. **Those steps?**
12 Q. Yes.
13 A. **I believe they're rocks.**
14 Q. See them right here?
15 A. **Yes.**
16 Q. Were you aware, ma'am, there was treated
17 wood used for the green plate underneath the
18 construction of the cabins, as an example?
19 A. **No.**
20 Q. Are you aware that there is treated wood
21 that's used in the landscaping throughout Angel
22 Valley so that it doesn't rot?
23 A. **No.**
24 Q. Now, take a look at 867. And I ask you
25 about some Porta Pottys. Do you see them back

1 there?
2 A. **Yes.**
3 Q. Again, you're aware that Porta Pottys
4 contain chemicals; correct?
5 A. **Yes.**
6 Q. Now, in October of 2009 did you go with
7 your husband into the pump house to get the tarps
8 that were used to construct the sweat lodge?
9 A. **Yes.**
10 Q. Did you see granular rat poison on the
11 floor of the pump house?
12 A. **Not that I remember.**
13 Q. If Angel Valley has a policy against
14 herbicides and pesticides, then one would not
15 expect to find granular ant poison in the shop;
16 correct?
17 A. **Correct.**
18 Q. And if Fawn Foster, your friend, had
19 found granular rat poison in the shop and used it
20 at various structures at Angel Valley to control
21 ants, that's something you wouldn't know about;
22 correct?
23 A. **Correct.**
24 Q. Now, take a look at 799. In October
25 of 2009 did you see any rat poison placed on a

1 dinner plate in the pump house at Angel Valley?
2 A. **No.**
3 Q. Would you agree with me, Ms. Mercer, that
4 if this Just One Bite rat poisoning was provided to
5 the defense two weeks ago, this photograph, that
6 that would be after Mr. Li's opening statement in
7 this case?
8 A. **Can you say that again.**
9 MS. POLK: Your Honor, objection to the
10 foundation.
11 MR. KELLY: I'll strike the question.
12 THE COURT: Sustained.
13 Q. BY MR. KELLY: In October of 2009 you
14 never saw rat poison on a plate in the pump house;
15 correct?
16 A. **Correct.**
17 Q. In fact, you never saw the pump house in
18 a clean condition like this; correct?
19 A. **Correct.**
20 Q. So if someone took a picture, like the
21 Hamiltons, and gave it to us two weeks ago, that
22 would be staged because that's not the way it was
23 in October of 2009; correct?
24 A. **Correct.**
25 MR. KELLY: Can we take a look at Exhibit 797?

1 Q. You've never seen the pump house that
2 clean; correct?
3 A. **No. There is nothing in it. I mean,**
4 **usually it has stuff in it. Tarps and --**
5 Q. Your husband told us it's pretty messy in
6 there most of the time. This looks pretty clean to
7 me. Doesn't it to you?
8 A. **Yes. There is nothing in it. There is**
9 **no tarps or blankets. Usually there is stuff in**
10 **it. But I've never seen it empty.**
11 Q. And, again, if this photograph, 797, was
12 provided by the Hamiltons just two weeks ago, it
13 would not reflect the condition of the pump house
14 back in October of 2009; correct?
15 A. **Correct.**
16 Q. Now, you told us on direct about an
17 incident in 2007 where a man went to Oak Creek to
18 cool off. Do you recall that?
19 A. **Yes.**
20 Q. How far would you estimate Oak Creek is
21 between the location of the sweat lodge and the
22 creek itself?
23 A. **It depends on how the creek is flowing.**
24 **But at that time? A hundred yards probably.**
25 Q. Pardon me?

1 **A. Maybe a hundred yards.**
 2 MR. KELLY: Let's take a look at -- let's put
 3 back up 146.
 4 **Q.** Ms. Mercer, take a look at Exhibit 146.
 5 Do you see the three Dream Team members in the blue
 6 T-shirts?
 7 **A. Yes.**
 8 **Q.** You see the chairs?
 9 **A. Yes.**
 10 **Q.** You see the lady with the black tank top?
 11 **A. Yes.**
 12 MR. KELLY: If we can put up 145.
 13 **Q.** In 145 do you see yourself in front of
 14 the door?
 15 **A. Yes.**
 16 **Q.** Do you see the ladies with the blue
 17 T-shirts?
 18 **A. Yes.**
 19 **Q.** Do you see the lady with the black tank
 20 top?
 21 **A. Yes.**
 22 **Q.** So does that refresh your recollection
 23 that that sweat lodge could be in 2009?
 24 **A. It could be.**
 25 **Q.** Okay. Now, at the beginning this morning

1 we talked about James Ray and the JRI sweat lodge
 2 ceremonies and how they were more of a contest -- I
 3 think you used that word in the past -- than a
 4 spiritual event. Correct?
 5 **A. Correct.**
 6 **Q.** And you have never spoke directly with
 7 James Ray; correct?
 8 **A. Yes, I have.**
 9 **Q.** Let me rephrase that question. Other
 10 than during the ceremony when he's asking you for
 11 rocks and water, you haven't had a conversation
 12 with him; correct?
 13 **A. I have.**
 14 **Q.** Where was that?
 15 **A. It was by the kitchen.**
 16 **Q.** Before or after the sweat lodge?
 17 **A. Before.**
 18 **Q.** And how much time before?
 19 **A. This was in 2008.**
 20 **Q.** Okay. During that conversation, what did
 21 Mr. Ray tell you?
 22 **A. What did he tell me?**
 23 **Q.** Yeah. What was the conversation about?
 24 **A. He asked me where there was a Starbucks.**
 25 **Q.** Okay. So other than that conversation

1 about Starbucks in Sedona, Arizona, you haven't had
 2 any direct communications with Mr. Ray other than
 3 as the doorkeeper in 2009; correct?
 4 **A. Other than telling me to do something**
 5 **else another time.**
 6 **Q.** Well, in regards to 2009, his stay there.
 7 Okay.
 8 **A. Okay.**
 9 **Q.** You show up to be the doorkeeper. That's
 10 your sole function during the JRI ceremony. Fair
 11 statement?
 12 **A. Yes.**
 13 **Q.** Now, you did not attend the presweat
 14 lodge presentation in the Crystal Hall; correct?
 15 **A. No.**
 16 **Q.** You didn't see the lady, Elsa Hefstad,
 17 leave after hearing that presentation?
 18 **A. No.**
 19 **Q.** You don't have any idea as to what
 20 Mr. Ray said in regards to warning or providing
 21 information to the participants in 2009; correct?
 22 **A. No.**
 23 **Q.** I mean, isn't that correct? You weren't
 24 there?
 25 **A. Well, I don't hear what happens before**

1 **they get to the area, but when they get to the**
 2 **area, I hear that.**
 3 **Q.** Let me try this again. Were you aware
 4 that before they lined up to enter the sweat lodge
 5 there was a presentation provided by James Ray in
 6 the Crystal Hall?
 7 **A. Okay.**
 8 **Q.** Were you aware of that?
 9 **A. No.**
 10 **Q.** Okay. If there was such a presentation,
 11 then you would not know what was said; correct?
 12 **A. Correct.**
 13 **Q.** You would not know that Mr. Ray told them
 14 that it was going to be a very hot sweat lodge?
 15 **A. Correct.**
 16 **Q.** You would not know that Mr. Ray told them
 17 how to get out if they needed to get out; correct?
 18 **A. Well --**
 19 **Q.** You weren't there?
 20 **A. But that was -- there was some direction**
 21 **given at the sweat lodge about that as well.**
 22 **Q.** I'm talking about the --
 23 **A. I don't know what they said there.**
 24 **Q.** And you wouldn't know whether anybody
 25 after listening to that said I'm not going to do

1 this and left?

2 **A. Right.**

3 **Q.** In 2009 as they line up, you do hear
4 Mr. Ray say if you're going to get out, go out
5 clockwise so that you don't create a hazard to
6 other participants; correct?

7 **A. Yes.**

8 **Q.** In other words, that there is going to be
9 elbows, legs and knees in there. So be careful.

10 There is hot rocks in the pit in the middle.

11 Correct?

12 **A. Yes.**

13 **Q.** And don't want anybody to get burned, so
14 go out in an orderly, clockwise manner if you have
15 to leave; correct?

16 **A. Not really.**

17 **Q.** You didn't hear that in the presentation,
18 I take it. So did he say that just before they
19 went in?

20 **A. But it's not -- yes.**

21 **Q.** Okay. Then it's your job to operate the
22 door; correct?

23 **A. Correct.**

24 **Q.** And when -- it was your testimony on
25 direct that when two Dream Team members attempted

1 to force someone into the sweat lodge against her
2 will, you stopped them; correct?

3 **A. Yes.**

4 **Q.** You said something?

5 **A. I said something to them.**

6 **Q.** And they stopped?

7 **A. Yes.**

8 **Q.** Now, throughout 2009, through each and
9 every round, you operated the door; correct?

10 **A. Correct.**

11 **Q.** And you did not leave the door open
12 longer than Mr. Ray requested; correct?

13 **A. Correct.**

14 **Q.** You could have left it open if you
15 thought there should be more air in there; correct?

16 **A. Correct.**

17 **Q.** You never talked to James Ray and said,
18 we're not getting enough ventilation in here, did
19 you?

20 **A. No.**

21 **Q.** You never talked to James Ray and said,
22 it's getting too hot in here; correct?

23 **A. Right.**

24 **Q.** You didn't talk to James Ray and say
25 there are people in distress? We'd better help

1 them; correct?

2 **A. Correct.**

3 **Q.** Your husband, Ted, is right there;
4 correct? He's right here attending the fire;
5 correct?

6 **A. Yes.**

7 **Q.** And you knew that Ted Mercer was
8 certified as a scuba EMT of some type; correct?

9 **A. Yes.**

10 **Q.** In other words, he had some specialized
11 medical training; correct?

12 **A. He's an emergency first responder.**

13 **Q.** Right. And you knew he had that in
14 October of 2009; correct?

15 **A. Yes.**

16 **Q.** And you never turned to Ted and said,
17 Ted, these people are in distress. Help them out.
18 Correct?

19 **A. During the sweat lodge?**

20 **Q.** During the sweat lodge.

21 **A. No.**

22 **Q.** And yet you knew he was an emergency
23 first responder certified?

24 **A. Yes. Well, that was not his function at**
25 **the --**

1 **Q.** You didn't talk -- when you heard these
2 conversations and had the concerns -- I see one,
3 two, three, four other people outside the sweat
4 lodge while you're holding space. You didn't talk
5 to those people and tell them about your concerns;
6 correct?

7 **A. Correct.**

8 **Q.** You knew this time, as you told
9 Detective Diskin back in October of 2009, that
10 people were free to leave; correct?

11 **A. That's not a yes or no answer, I don't**
12 **think.**

13 **Q.** Are you saying -- we went through this
14 before lunch. Are you saying at any time my client
15 stopped somebody from leaving the sweat lodge?

16 **A. He did not physically stop anyone.**

17 **Q.** What he said was, you're not your body.
18 You're more than that. Something to that effect?

19 **A. Correct.**

20 **Q.** And he encouraged them to stay in?

21 **A. Yes.**

22 **Q.** He encouraged them to go back in after
23 they went out?

24 **A. Correct.**

25 **Q.** People left certain rounds; correct?

1 A. Yes.
 2 Q. Some stayed out; correct?
 3 A. Yes.
 4 Q. Some went back in; correct?
 5 A. Yes.
 6 Q. Some stayed in; correct?
 7 A. Uh-huh.
 8 Q. Were you aware that people moved around
 9 while they were in the sweat lodge?
 10 A. No.
 11 Q. Okay. But if they did, you don't have
 12 any reason to dispute that?
 13 A. Correct.
 14 Q. Went to cooler spot in the sweat lodge so
 15 they could stay longer? Does that make sense?
 16 A. Sure.
 17 Q. All of those folks exercising free will;
 18 correct?
 19 A. To a point.
 20 Q. Are you telling us that Scott Barratt, a
 21 general contractor, military pilot, cowboy, is not
 22 capable of exercising free will because of some
 23 hocus-pocus from James Ray? Is that your
 24 testimony?
 25 A. No.

1 Q. Are you saying that his words, mere
 2 words, "you can beat this," "you can overcome it,"
 3 somehow interfered with the free will of these
 4 people?
 5 A. Yes.
 6 Q. And, of course, you're not a
 7 psychiatrist?
 8 A. Correct.
 9 Q. You're not a psychologist?
 10 A. No.
 11 Q. You didn't interview these people?
 12 A. No.
 13 Q. You don't know their names?
 14 A. No.
 15 Q. You didn't listen to their testimony?
 16 A. No.
 17 Q. You don't have any idea as to what they
 18 told this jury?
 19 A. Correct.
 20 Q. So you're guessing?
 21 A. I'm giving you my story.
 22 Q. Your story?
 23 A. My testimony. Yes.
 24 Q. Well, but you're guessing because you
 25 don't know all those facts I just outlined;

1 correct?
 2 Correct?
 3 A. It's my testimony.
 4 Q. But you're guessing; correct?
 5 A. At what? I don't know what the question
 6 is. I'm guessing at what?
 7 Q. Did you know any of the participants --
 8 A. I did not know --
 9 Q. -- at the sweat lodge in 2009?
 10 A. No.
 11 Q. Did you interview any participant during
 12 their experience in 2009?
 13 A. No.
 14 Q. Have you listened to any of their
 15 testimony in this courtroom in 2011?
 16 A. No.
 17 Q. You're making an assumption that somehow
 18 Mr. Ray was able to coerce them to stay in the
 19 sweat lodge based simply on words? Is that your
 20 testimony?
 21 A. Not my complete testimony. But yes.
 22 Q. And you would agree with me you have no
 23 foundation for that -- correct? -- but you want
 24 this jury to believe that?
 25 A. I would not agree that I have no

1 foundation.
 2 Q. The foundation is what?
 3 A. Can you rephrase the question.
 4 Q. You said you wouldn't agree you didn't
 5 have foundation to draw that conclusion. I'm
 6 asking what the foundation is.
 7 A. Because when people are unconscious, they
 8 don't have free will. When people can't get their
 9 body to move even if they wanted to, they don't
 10 have free will. When the door is not open, they
 11 couldn't leave. So their free will, I would say,
 12 was limited by whether the door was open, whether
 13 they could get their body to move and whether or
 14 not they were not passed out. And I believe that
 15 James's words convinced people --
 16 MS. POLK: Your Honor, may the witness finish.
 17 MR. KELLY: Just a minute, Judge. It's my
 18 witness.
 19 MS. POLK: Mr. Kelly interrupted the witness.
 20 THE COURT: You may finish your answer.
 21 THE WITNESS: I believe that James's words
 22 convinced people to stay beyond what they knew
 23 their body could take.
 24 Q. BY MR. KELLY: First of all, as to people
 25 who were unconscious, James's words would have no

1 impact on them; correct?

2 **A. Not once they're unconscious. Before --**

3 **Q.** So my questions were directed towards

4 people who were not unconscious.

5 **A. Okay.**

6 **Q.** Is it your testimony, then, that it's his

7 words that kept those people in there?

8 **A. Yeah.**

9 **Q.** And you base that opinion, or you have

10 that opinion despite the fact having never spoken

11 to any of these participants; correct?

12 **A. Yes.**

13 **Q.** Never spoke to Dr. Jeanne Armstrong;

14 correct?

15 **A. I don't know who that is.**

16 **Q.** Never spoke to Laura Tucker; correct?

17 **A. I don't know who that is.**

18 **Q.** Never spoke to Scott Barratt; correct?

19 **A. Correct.**

20 **Q.** You never spoke to Melissa Phillips;

21 correct?

22 **A. No.**

23 **Q.** So would you agree with me their

24 testimony under oath in this courtroom as to

25 whether they were exercising free will is better

1 than the assumption you described to this jury?

2 **A. That would be up to the jury, I would**

3 **imagine. My job is to tell my testimony. And that**

4 **is what I would testify to.**

5 **Q.** Did you hear my question?

6 **A. Yes.**

7 **Q.** Would you agree with me -- let's take one

8 person, Scott Barratt. That if he testified that

9 your assumption is not true under oath in front of

10 this jury, should the jury believe Mr. Barratt or

11 Ms. Mercer?

12 **MS. POLK:** Your Honor, objection.

13 Argumentative.

14 **THE COURT:** Sustained.

15 **Q.** BY MR. KELLY: Would you agree that your

16 assumption is false if Mr. Barratt testified

17 different in regards?

18 **A. Yes.**

19 **Q.** Now, do you recall your interview with

20 Detective Edgerton on October 8, 2009?

21 **A. No.**

22 **Q.** You don't?

23 **A. I've been shown the transcripts of it,**

24 **which has refreshed my memory. But if you asked me**

25 **based on my memory what happened there, no. I**

1 **don't remember. I remember I was treated in the**

2 **emergency room.**

3 **Q.** So you don't remember the detective being

4 in --

5 **A. I do remember the detective being there.**

6 **Q.** You don't remember any of the content of

7 that conversation?

8 **A. I remember that she asked us about what**

9 **happened. But I would not be able to testify**

10 **honestly what was said there without looking at**

11 **transcripts.**

12 **Q.** Let's get the sequence down. The sweat

13 lodge on October 8, 2009, is in the afternoon;

14 correct?

15 **A. It started at 2:00 and ended at about**

16 **5:00.**

17 **Q.** After the sweat lodge is over, the EMS

18 providers arrived; correct?

19 **A. Probably about 9:00.**

20 **Q.** You go home; correct?

21 **A. Uh-huh.**

22 **Q.** You come back to the scene; correct?

23 **A. No.**

24 **Q.** You go back to the location?

25 **A. No.**

1 **Q.** And then you go to the Sedona Medical

2 Center; correct?

3 **A. Yes.**

4 **Q.** So there is the sweat lodge ceremony, the

5 EMS providers. Then you and Ted go to your house

6 for a few minutes; correct? You come back to where

7 they're at --

8 **A. No. No.**

9 **Q.** The EMS says --

10 **A. No. EMS came to my house.**

11 **Q.** Okay. EMS comes to your house. Says go

12 to the hospital?

13 **A. Yes.**

14 **Q.** So you're at the hospital some what?

15 Four, five hours after the sweat lodge is over?

16 **A. I don't know how long I was there.**

17 **Q.** Well, tell us.

18 **A. I said I don't know how long I was at the**

19 **hospital.**

20 **Q.** No. When did you arrive at the hospital?

21 **A. I don't know.**

22 **Q.** How many hours after the sweat lodge

23 ended did you go to the hospital?

24 **A. I honestly don't know.**

25 **Q.** How many hours after the sweat lodge did

1 the EMS guy come to your house?

2 **A. I don't know.**

3 **Q.** How long were you at your house before
4 the EMS guy showed up?

5 **A. Half an hour.**

6 **Q.** I want to make sure I understand your
7 testimony. Are you telling this jury you have no
8 recollection of the interview between you and the
9 detective at the Sedona Medical Center?

10 **A. No. That's not my testimony.**

11 **Q.** Do you recall telling the detective when
12 asked specifically what you heard, you told her all
13 you heard was moaning --

14 MS. POLK: Objection, Your Honor. Hearsay.
15 There needs to be a question posed to the witness,
16 and an inconsistent statement can be used. But
17 just to confront her with a statement is improper.

18 THE COURT: Sustained.

19 MR. KELLY: Your Honor, there has been four
20 hours of inconsistent statements.

21 THE COURT: Mr. Kelly, no speaking objections
22 in response.

23 MR. KELLY: May we approach?

24 THE COURT: No. Sustained.

25 **Q.** BY MR. KELLY: Did you tell -- did you

1 ever make a statement that all you heard --

2 MS. POLK: Your Honor, same objection.

3 THE COURT: Okay. Counsel.

4 Ladies and gentlemen, Ms. Mercer, please
5 feel free to stand and stretch while we have this
6 bench conference.

7 MR. KELLY: Judge, I'll rephrase in the
8 interest of time.

9 **Q.** Do you have any recollection of telling
10 the detective what happened when you were in the
11 Sedona Medical Center?

12 **A. I don't remember what I said when I was**
13 **in the Sedona Medical Center other than reading my**
14 **transcripts that were given to me from that**
15 **interview. I remember being there. And I remember**
16 **being treated, and I remember the recording that**
17 **was played during the other hearing. But if you**
18 **asked me what I said there, I honestly would have**
19 **to say I don't recall.**

20 MR. KELLY: Your Honor, I'd ask to play now
21 clip 3 of what will be Exhibit 895.

22 MS. POLK: Objection. Hearsay.

23 MR. KELLY: It is 631, page 13, line 23,
24 through page 14, line 14.

25 THE COURT: We are going to need to have a

1 bench conference. Counsel, please approach.

2 (Sidebar conference.)

3 THE COURT: Mr. Kelly, you're proposing to do
4 what, and Ms. Polk had an objection?

5 MR. KELLY: I'm proposing to play the clip
6 identified out of the exhibit where she tells in
7 response to specific questions what she heard
8 during the sweat lodge ceremony, which is
9 substantially different than her entire testimony
10 at this point. And I have, Judge, for an offer of
11 proof the area highlighted. Sheila hasn't seen
12 this. But if you would like to look at it.

13 And her tone and the quality goes to her
14 believability as a witness.

15 THE COURT: Ms. Polk.

16 MS. POLK: This is classic hearsay. There has
17 been no question of the witness. There needs to be
18 a question. And then if she testifies -- she needs
19 to be confronted. And if there is something that's
20 different, then he can confront her with it, with
21 an inconsistent statement. But it's not even clear
22 to me what he's confronting her on.

23 THE COURT: Mr. Kelly, at this point, I can
24 make a finding about whether or not it's
25 appropriate if someone says he or she doesn't

1 remember. But it's just amorphous. I don't
2 know -- there has to be a question and then the
3 opportunity to explain any discrepancy.

4 MR. KELLY: Judge, what I'd like to do is play
5 the clip so she can hear the tone of her voice.
6 Because she's saying she doesn't remember what
7 happened in the Sedona Medical Center. She sounds
8 perfectly coherent to me. And then the jury can
9 draw the conclusion as to the credibility. Of
10 course, she's free to explain it.

11 But when I can't even ask the question,
12 did you tell the detective all you heard was
13 moaning and groaning, no specific statements like
14 she's testified during the last two days, that is a
15 proper inconsistent statement.

16 THE COURT: Well, just to randomly put out a
17 clip there, I'm going to sustain the objection to
18 that. If there is specific testimony in an area
19 and she either has a different version today or has
20 testified as to a different version or doesn't
21 remember, then I can deal with that. At this point
22 I'm not going to allow just a playing of the
23 tape --

24 MR. KELLY: Judge then --

25 THE COURT: -- recording, Mr. Kelly.

1 MR. KELLY: I'm allowed to ask her the
2 question that I originally tried to ask her, which
3 was did you tell the detective the only thing that
4 you heard was moaning and groaning? No specifics
5 like she's been telling this jury. And then when
6 that was tried to be asked, Ms. Polk objected based
7 on hearsay. It's her statement. It's inconsistent
8 with her testimony.

9 MS. POLK: Your Honor, there has to be a
10 question posed to the witness. Confrontation with
11 a specific statement --

12 MR. KELLY: I tried to do that, and I was
13 stopped.

14 THE COURT: Well, if it's -- there has to be
15 testimony from a current version if there is going
16 to be impeachment. I don't know what the current
17 version is. If it was an incorrect -- if the
18 objection --

19 MR. KELLY: I'll reask the question.

20 THE COURT: Okay.

21 (End of sidebar conference.)

22 Q. BY MR. KELLY: Ms. Mercer, do you recall
23 your testimony on direct were Ms. Polk was asking
24 you a question regarding statements my client
25 purportedly made during the 2009 sweat lodge?

1 A. Yes.

2 Q. Do you recall telling Detective Edgerton
3 something different?

4 A. I don't recall.

5 Q. Do you recall telling the detective that
6 all you could hear is the moaning and groaning and
7 people breathing hard, and then James will tell you
8 to slow down your breathing, but that's normal?

9 Do you recall that?

10 A. No.

11 MR. KELLY: Your Honor, now I'd ask to play
12 clip No. 3.

13 THE WITNESS: Like I said, I read it in my
14 transcript. I'm not denying I said it.

15 MR. KELLY: Exhibit 631 is the transcript,
16 Judge, page 13, line 23, through page 14, line 14.

17 MS. POLK: Your Honor, again, there is just
18 one exhibit. I have the transcript.

19 THE COURT: On the transcript, the page and
20 line number again, Mr. Kelly?

21 MR. KELLY: On the transcript the page is 13,
22 line 23, through page 14, line 14. And it will be
23 marked consistent with the earlier clip as
24 Exhibit 895. And it's identified on 895 as clip
25 No. 3.

1 THE COURT: Okay. All right.

2 MR. KELLY: Thank you, Judge.

3 (Exhibit 895 played.)

4 Q. BY MR. KELLY: Now, Ms. Mercer, did you
5 hear on Exhibit 895 the question from the
6 detective, did you notice anybody during the actual
7 sweat lodge or -- I don't know -- because you
8 weren't inside? But did you hear anybody in there
9 having any specific problems?

10 A. Yes. I heard that.

11 Q. And do you remember your response?

12 A. I just heard it.

13 Q. Your response was that oh. You hear
14 moaning and groaning and people breathing hard.
15 And then -- you know -- James will tell you to slow
16 your breathing down or -- but yeah. That's normal.

17 A. Yes.

18 Q. There is a bunch of people in there
19 experiencing it. Correct?

20 A. Correct.

21 Q. And you would agree with me there were no
22 specifics provided in regards to actual statements
23 from my client; correct?

24 A. At that time, yes.

25 Q. Other than your husband saying, he does

1 say you have to stay. He encourages them to tough
2 it out.

3 You said yeah. You're not your body;
4 correct?

5 A. Correct.

6 Q. But nothing about a person being
7 unconscious; correct?

8 A. Correct.

9 Q. Nothing about a person not breathing;
10 correct?

11 A. Correct.

12 Q. Now, on October 8 at the Sedona Medical
13 Center, that was your first interview with the
14 police; correct?

15 A. Yes.

16 Q. And it was right after this accident;
17 correct?

18 A. Yes.

19 Q. I mean --

20 A. Still during, in my opinion. Yes.

21 Q. Still during because why? Emotionally
22 you haven't gotten over it?

23 A. It was still occurring. There was still
24 people being treated. There was still people
25 suffering. So to me it was still an occurring

1 **accident.**

2 **Q.** Let's make it clear to the jury. You
3 were never inside the sweat lodge in October
4 of 2009; correct?

5 **A. Correct.**

6 **Q.** You were always outside; correct?

7 **A. Yes.**

8 **Q.** You told Ms. Polk that the fire didn't
9 affect you; correct?

10 **A. Correct.**

11 **Q.** You told us that there was a care station
12 where you could get water if you needed water;
13 correct?

14 **A. Yes.**

15 **Q.** And I saw your husband, in fact, drinking
16 out of a quart bottle of water. Do you see that?

17 **A. Yes.**

18 **Q.** So we have plenty of water, nice day in
19 October of 2009 in Sedona, Arizona; correct?

20 **A. Correct.**

21 **Q.** So you were not subjected to the heat
22 inside the sweat lodge; correct?

23 **A. Correct.**

24 **Q.** You were not subjected to the humidity
25 inside the sweat lodge; correct?

1 **A. Correct.**

2 **Q.** And it was on that day within several
3 hours of the sweat lodge that you made this
4 statement to the detective that all you could hear
5 is moaning and groaning. James will tell you to
6 slow your breathing down. And that's normal.
7 Correct?

8 **A. Correct.**

9 **Q.** And you on that day did not participate
10 in the JRI seminar; correct?

11 **A. Correct.**

12 **Q.** So you weren't subject to the Samurai
13 Game, as an example; correct?

14 **A. No.**

15 **Q.** You didn't have to go on the Vision
16 Quest; correct?

17 **A. Correct.**

18 **Q.** You did not have to eat the vegetarian
19 diet?

20 **A. No.**

21 **Q.** You didn't have to go through the
22 Holotropic breathing; correct?

23 **A. Excuse me?**

24 **Q.** You didn't have to engage in Holotropic
25 breathing; correct?

1 **A. No.**

2 **Q.** You didn't have to undergo any type of
3 meditation; correct?

4 **A. No.**

5 **Q.** So when you showed up in October of 2009,
6 your sole purpose was to assist your husband in
7 running the sweat lodge; correct?

8 **A. Yes.**

9 **Q.** And you told us that this interview took
10 place within several hours of the sweat lodge
11 event?

12 **A. Yes.**

13 **Q.** And you were telling the truth; right?

14 **A. I usually tell the truth. Yes.**

15 **Q.** Of course you were. And you were the
16 person -- we went through this. You were the
17 person that was operating that door on that day;
18 correct?

19 **A. Yes.**

20 **Q.** And you knew that if somebody was dying
21 inside of that sweat lodge, you would have left
22 that door open or you would have drug him out or
23 you would have talked to James or you would have
24 talked to your husband. You would have done
25 something; correct?

1 **A. Yes.**

2 **Q.** Now I'm going to put 145 back up.
3 We don't know which particular round this
4 is; correct?

5 **A. No.**

6 **Q.** But you told us that James would call for
7 the number of rocks after a round?

8 **A. Yes.**

9 **Q.** And then your husband would retrieve them
10 from this fire, take them over to the location,
11 which is at his feet now.

12 Maybe Ms. Do can blow that up.

13 Do you see those flagstone rocks there?

14 **A. Yes.**

15 **Q.** And I guess your husband, then, would
16 place the volcanic rocks on top of these rocks.
17 Correct?

18 **A. Yes.**

19 **Q.** And then Rotillo was the duster. He
20 would dust them off; correct?

21 **A. No.**

22 **Q.** Who would dust them off?

23 **A. Either myself or Sarah. Ted and Rotillo
24 got the rocks out of the fire and put them on the
25 rocks -- on those rocks. And then Sarah or I would**

1 **put them into the sweat lodge.**

2 Q. And they're volcanic rocks, the ones with
3 the little --

4 A. **Lava rocks.**

5 Q. Lave rocks that have the little holes in
6 them all over --

7 A. **Correct.**

8 Q. And you were responsible for dusting them
9 off -- you and Sarah?

10 A. **Yes.**

11 Q. You would agree with me it takes some
12 time to get a rock out of that hot fire and put
13 over on the flagstone stand; correct?

14 A. **Yes.**

15 Q. Then from the flagstone dust-off area,
16 the rocks were then taken to the door of the sweat
17 lodge; correct?

18 A. **Yes.**

19 Q. And that's when they were handed to
20 someone inside?

21 A. **Yes.**

22 Q. And I believe you told us that at the end
23 of the first round there were 12 rocks requested?

24 A. **Yes.**

25 Q. And a total of how many rocks that day?

1 A. **I don't --**

2 Q. I think you told us 50-some. Does that
3 sound right?

4 A. **I would think over 50. But yes.**

5 Q. Well, you would agree with me that if
6 someone counted the rocks, someone like
7 Detective Diskin on that day, that number is
8 probably right?

9 A. **Yes.**

10 Q. And you told us in 2008 your recollection
11 was that 88 rocks were used. Do you recall that?

12 A. **Yes.**

13 Q. And you would agree with me that 88 is a
14 higher number than 52?

15 A. **Yes.**

16 MR. KELLY: Let's go back out to --

17 Q. So this is taking a little bit of time
18 between the rounds to retrieve the rocks out of the
19 fire, take them over to the dust-off area, dust
20 them and put them in; correct?

21 A. **Yes.**

22 MR. KELLY: Let's put up Exhibit 508.

23 Q. Do you recognize Exhibit 508 as a
24 photograph taken by the sheriff after the accident?

25 A. **Yes.**

1 Q. And what I want to direct your attention
2 to is a log over in the right-hand corner. Do you
3 see right above the Igloo cooler?

4 A. **Yes.**

5 Q. Is that where your friend Fawn Foster was
6 seated throughout the ceremony?

7 A. **I don't know.**

8 Q. Did you ever see what Fawn Foster was
9 doing during the rounds?

10 A. **No.**

11 Q. Do you know whether Fawn Foster was the
12 one that went to get water and ice for Lou Caci?

13 A. **Yes. I do remember her doing that.**

14 Q. What do you remember?

15 A. **I remember her running, getting a bucket
16 of water and bringing it to him to put his hand in
17 it.**

18 Q. So it was not -- did you ever meet a
19 person by the name of Melinda Martin?

20 A. **No.**

21 Q. But you know it wasn't a Dream Team
22 member or a person on JRI staff; correct?

23 A. **Not who got the water.**

24 Q. That's what I'm asking.

25 A. **Yes.**

1 Q. It was definitely Fawn?

2 A. **I saw Fawn bring a bucket and put his
3 hand in it.**

4 Q. How many times have you and Fawn talked
5 about what happened?

6 A. **Since that night?**

7 Q. Yes, ma'am?

8 A. **We don't talk about it.**

9 Q. You don't ever talk about what happened
10 that night?

11 A. **We have talked about emotions, but we
12 haven't talked about the incidents of the evening.**

13 Q. What about back in October of 2009 when
14 you leave the area of the accident and you go to
15 your home? Fawn is with you; correct?

16 A. **Yes.**

17 Q. Ted's with you; correct?

18 A. **Yes.**

19 Q. And Sarah is with you?

20 A. **Yes.**

21 Q. You guys are talking about what happened;
22 correct?

23 A. **I think we were consoling Sarah. She was
24 really emotional. And we were all pretty much
25 trying to calm her down. And then I started**

1 **getting nauseous. So we weren't really conversing**
2 **about what had happened.**

3 **Q.** You didn't say, man, I can't believe that
4 happened? Anything like that? Start talking about
5 what happened?

6 **A. No. We did not discuss what happened.**
7 **We were talking about the -- Sarah was very, very**
8 **upset. We were trying to calm her down. And then**
9 **I started getting nauseous and gagging and throwing**
10 **up. So I went into the bathroom. And I thought if**
11 **I took a bath, maybe I'd feel better. And I got**
12 **worse. So no. We didn't talk.**

13 **Q.** I take it you've never talked to your
14 daughter, Sarah, about what happened?

15 **A. We talk -- she doesn't talk about it.**

16 **Q.** I take it that you've never talked to
17 your husband, Ted Mercer, about what happened?

18 **A. Not about the details of what happened.**
19 **We were told not to once it became an**
20 **investigation.**

21 **Q.** So there -- the three of you living
22 together, and you've never talked about this
23 incident in October of 2009?

24 **A. That's correct.**

25 **Q.** That's your testimony. And your

1 daughter, Sarah, was so emotionally upset that you
2 had to console her; correct?

3 **A. Yes.**

4 **Q.** But you consoled her without making
5 reference to what happened; correct?

6 **A. I can't remember exactly what we did**
7 **but --**

8 **Q.** But you know you haven't talked about it;
9 correct?

10 **A. Yes.**

11 **Q.** Because you told us that. And you knew
12 that she was upset; correct?

13 **A. Yes.**

14 **Q.** But in consoling her you didn't want to
15 talk about what happened?

16 **A. We were saying it's okay --**

17 **Q.** Let me finish my question. You don't
18 want to help your daughter, Sarah, out because you
19 knew there was a police investigation? So you
20 don't want to talk about what happened; correct?

21 **A. Correct.**

22 **Q.** After the third round -- let me go back.
23 In the second round, I think, you told us about 12
24 people came out. Is that correct?

25 **A. Yes.**

1 **Q.** So, again, 12 people came out of the
2 sweat lodge on their own, and Mr. Ray didn't
3 physically stop them from doing that?

4 **A. Correct.**

5 **Q.** He was encouraging them to stay in;
6 correct?

7 **A. Yes.**

8 **Q.** Was he encouraging them to come back in
9 after they had been out?

10 **A. Yes.**

11 **Q.** You told us on direct examination, in
12 response to a question, between rounds people who
13 wanted to leave would leave. Would you agree with
14 that?

15 **A. Yes. If they were capable.**

16 **Q.** I realize it's been a few days.

17 **A. No. I meant if they're able. I mean, if**
18 **they were able to leave, they could.**

19 **Q.** The door was open about 8 to 10 minutes
20 between the rounds; correct?

21 **A. That's my estimation.**

22 **Q.** We talked at the beginning of the
23 testimony about Liz Neuman. I asked you a
24 question, did you realize that the lady sitting
25 next to her asked her if she was okay, and she said

1 yes?

2 **A. No.**

3 **Q.** You would agree with me that people
4 inside the sweat lodge were right next to these
5 people would have a better opportunity to hear what
6 was going on versus you on the outside?

7 **A. Definitely.**

8 **Q.** And you probably, Ms. Mercer, were closer
9 than Fawn Foster; correct?

10 **A. I don't know where Fawn was. I can't**
11 **testify where she was other than what I saw her do**
12 **when I did. I don't know.**

13 **Q.** If she was sitting on that log, you would
14 agree with me that you were closer than a person
15 sitting on the log?

16 **A. Yes.**

17 **Q.** You were closer than Ted Mercer; correct?

18 **A. For the whole --**

19 **Q.** Throughout?

20 **A. Throughout the lodge I'm sure people**
21 **were -- Fawn probably came that close. Ted came**
22 **that close.**

23 **Q.** You were the door keeper?

24 **A. Yes.**

25 **Q.** You were the closest one is my point?

1 **A. Yes.**
 2 **Q.** Closer than Sarah; correct?
 3 **A. No. Sarah was right next to me. She was**
 4 **closest to James, I would say.**
 5 **Q.** Let's go back to 145. She's not right
 6 next to you at 145 during the sweat lodge?
 7 **A. I don't see her in that picture.**
 8 **Q.** Remember the discussion about weeds and
 9 herbicides?
 10 **A. Yes.**
 11 **Q.** There is a lot of bare area, isn't there?
 12 **A. A lot of what?**
 13 **Q.** Bare dirt.
 14 **A. Yes.**
 15 **Q.** In the foreground before of the sweat,
 16 behind it; correct?
 17 **A. Yes.**
 18 **Q.** You didn't pull all those weeds; correct?
 19 You personally?
 20 **A. I pulled a weed whenever I saw one**
 21 **personally.**
 22 **Q.** I mean, you didn't groom this area like
 23 this, pull all those weeds; correct?
 24 **A. No. Not for that sweat lodge. No.**
 25 **Q.** Now, you told us that a man that you

1 later identified as James Shore came out towards
 2 the end of the sixth or seventh round -- he didn't
 3 come out. He helped a person out. Do you recall
 4 that testimony?
 5 **A. Yes.**
 6 **Q.** At the end of which round is my question?
 7 **A. I would say the sixth or seventh. I'm**
 8 **not sure. Sixth round.**
 9 **Q.** And I asked you this question, but you
 10 were present with your husband when you guys were
 11 jointly interviewed at the Sedona Medical Center on
 12 October 8, 2009; correct?
 13 **A. What was the question?**
 14 **Q.** Remember being in the hospital?
 15 **A. Yes.**
 16 **Q.** And your husband was there?
 17 **A. Yes.**
 18 **Q.** And Detective Edgerton showed up;
 19 correct?
 20 **A. Yes.**
 21 **Q.** And she interviewed you; correct?
 22 **A. Yes.**
 23 **Q.** When she was interviewing you, both of
 24 you were talking; correct?
 25 **A. Yes.**

1 **Q.** And you were right there; correct?
 2 **A. Yes.**
 3 **Q.** Do you recall that interview your husband
 4 told the detective that the heat was the same
 5 between 2009 and 2008?
 6 **MS. POLK:** Objection, Your Honor. Misstates
 7 prior testimony. And it would be hearsay, Judge.
 8 **THE COURT:** Sustained.
 9 **Q.** BY MR. KELLY: Ms. Mercer, do you recall
 10 your husband telling the detective, I don't think
 11 it was any hotter than usual either?
 12 **A. I don't recall that personally. I read**
 13 **it in my statement.**
 14 **MR. KELLY:** Your Honor, I'd ask to play a clip
 15 for her of 895.
 16 **MS. POLK:** Your Honor, this is hearsay. This
 17 is a statement of another witness.
 18 **THE COURT:** Sustained.
 19 **Q.** BY MR. KELLY: You were present during
 20 this interview?
 21 **A. I was present during the interview.**
 22 **Q.** And you don't recall whether your husband
 23 talked about the heat of a sweat lodge, which on
 24 your direct examination you alluded was very, very
 25 hot? You don't recall that?

1 **A. No.**
 2 **MR. KELLY:** Your Honor, now I'd ask to play
 3 it.
 4 **MS. POLK:** Your Honor, objection. Hearsay.
 5 **THE COURT:** Sustained.
 6 **Q.** BY MR. KELLY: Ms. Mercer, you were
 7 present during an interview at the Sedona Medical
 8 Center?
 9 **A. Yes, I was.**
 10 **Q.** Your husband talked about how hot the
 11 sweat lodge was. Do you recall that?
 12 Strike that question. I've asked it.
 13 Do you know that your husband has opined
 14 that the sweat lodge was the same temperature
 15 between 2008 and 2009?
 16 **MS. POLK:** Your Honor, objection. Hearsay and
 17 misstates testimony.
 18 **THE COURT:** Sustained.
 19 **Q.** BY MR. KELLY: Ms. Mercer --
 20 **MS. POLK:** Your Honor, object to counsel
 21 continuing to ask the same question over and over.
 22 **MR. KELLY:** I'm not asking the same question.
 23 **THE COURT:** The hearsay objection has been
 24 sustained.
 25 Mr. Kelly, go ahead and ask a question.

1 Q. BY MR. KELLY: Do you believe the sweat
2 lodge in 2009 was no more hotter than it was
3 in 2008?

4 A. **My belief?**

5 Q. Yes.

6 A. **I don't know. I don't think it was
7 hotter.**

8 Q. You don't think it was hotter; correct?

9 A. **Uh-huh.**

10 Q. And you told us that 88 rocks went in
11 in 2008?

12 A. **Yes.**

13 Q. And you wouldn't dispute what
14 Detective Diskin counted in 2009; correct?

15 A. **No.**

16 Q. And you don't have an opinion as to
17 whether it was hotter in 2009 than it was in 2008;
18 correct?

19 A. **No. I'm not in the lodge, so I can't
20 testify to the temperature inside the lodge.**

21 Q. Right. And my question was you don't
22 have a belief that it's hotter in 2009 than it was
23 in 2008?

24 A. **No, I don't.**

25 Q. When the sweat lodge ceremony ended

1 in 2009, did you see Dr. Jeanne Armstrong come out
2 in a "Rocky" style pose indicating or exhibiting
3 that she had made it? conquered it? done it?

4 A. **No.**

5 Q. Did you see Laura Tucker come out?

6 A. **You're asking me to identify certain
7 people, and I cannot say that. I can say that I
8 may have seen some people come out like that. But
9 I don't know who that was.**

10 Q. Let me rephrase it, because obviously you
11 don't know their names, you've told us.

12 A. **No.**

13 Q. You told us you saw some people, and they
14 came out, and they were -- appeared to be excited
15 about the fact that they had made it; correct?

16 A. **Yes.**

17 Q. And, in other words, not everyone came
18 out in the condition that you described on direct;
19 correct?

20 A. **True.**

21 Q. That could have included people like
22 Dr. Armstrong and Dr. Wagoner; correct?

23 A. **Yes.**

24 Q. But you don't know because you don't know
25 folks?

1 A. **Right.**

2 Q. And those people would come out. They
3 would get a drink of water or get some fruit,
4 perhaps sit down on one of these chairs or lie down
5 on the tarp after this event; correct?

6 A. **Yes.**

7 Q. And after this event, it was even planned
8 to have a dinner to celebrate the event itself;
9 correct?

10 A. **I don't know.**

11 Q. I thought you told us a moment ago that
12 you --

13 A. **That was my dinner. I planned on having
14 dinner.**

15 Q. You're right.

16 Now, you told us on direct examination
17 that after the sweat lodge had ended, clearly
18 people were -- some people were in distress;
19 correct?

20 A. **Yes.**

21 Q. And you're not a medical doctor; right?

22 A. **No.**

23 Q. So you don't know what caused their
24 injuries; correct?

25 A. **No.**

1 Q. And you knew there was a problem;
2 correct?

3 A. **Yes.**

4 Q. And as a result of that, you went to call
5 9-1-1; correct?

6 A. **Yes.**

7 Q. And you told us that -- that you went
8 over to James and said, we need to call 9-1-1.
9 And he said something like, I don't know
10 what to do. Get a hold of Megan. Correct?

11 A. **No.**

12 Q. No. Then you told us that -- who told
13 you to call 9-1-1?

14 A. **My husband.**

15 Q. You told us that Ted said run up the road
16 or run to the office and call 9-1-1; correct?

17 A. **No.**

18 Q. Okay. What did he say?

19 A. **The nurse said, she's not breathing.
20 What do we do?**

21 **Ted, said call 9-1-1.**

22 **The nurse, who I believe to -- the nurse
23 said, find Megan. Find Megan. And ask her if we
24 can call an ambulance.**

25 Q. So the nurse said go find Megan?

1 **A. Yes.**
 2 **Q.** Not -- the nurse didn't say call 9-1-1?
 3 **A. No. Ted said call 9-1-1. The nurse said**
 4 **find Megan.**
 5 **Q.** And James Ray shrugged his shoulders and
 6 said, I don't know what to do?
 7 **A. James Ray was not in that conversation.**
 8 **Q.** That was a later conversation?
 9 **A. That was after I left where the people**
 10 **were and walked over to where James was. Actually,**
 11 **I ran over to where James was and said, I need to**
 12 **find Megan. I need a phone. Three people aren't**
 13 **breathing. We need to call an ambulance.**
 14 MR. KELLY: And, Judge, what I would ask to do
 15 is play clip 1 of Exhibit 895, marked for
 16 identification. But it is a portion of
 17 Exhibit 672, which has been admitted into evidence.
 18 It's page 1, lines 9 through 22. It's the 9-1-1
 19 call.
 20 THE COURT: Ms. Polk?
 21 MS. POLK: We're playing the 9-1-1 call?
 22 MR. KELLY: A clip off of it.
 23 MS. POLK: No objection.
 24 THE COURT: The clip will be played.
 25 (Exhibit 895 played.)

1 **Q.** BY MR. KELLY: Ms. Mercer, on Exhibit 672
 2 you told the 9-1-1 dispatcher that it was the nurse
 3 who told you to call 9-1-1; correct?
 4 **A. Correct.**
 5 **Q.** And the nurse that you're speaking of is
 6 a nurse who is a Dream Team member; correct?
 7 **A. Correct.**
 8 **Q.** And the one rendering aid; correct?
 9 **A. Yes.**
 10 **Q.** Now, when you go back, is that when you
 11 had the conversation with Mr. Ray? When you go
 12 back to the scene of the accident, is that when you
 13 have the conversation?
 14 **A. After I called 9-1-1, no.**
 15 **Q.** It was before?
 16 **A. Yes.**
 17 **Q.** Okay. So let me get this straight. Your
 18 testimony today is you speak to the nurse. The
 19 nurse says, call Megan. You speak to Ted. Ted
 20 says, call 9-1-1. And then you stop by and see
 21 Mr. Ray and ask him what to do?
 22 **A. I asked him where Megan was because I**
 23 **believed she had a phone -- I believed she had a**
 24 **cell phone on the scene. So that was why I**
 25 **trying --**

1 **Q.** So then he shrugs his shoulders and
 2 says -- when you ask him, where is Megan, he says,
 3 I don't know; correct?
 4 **A. I said, there is three people not**
 5 **breathing. We need to call an ambulance. Where is**
 6 **Megan?**
 7 **Q.** And he said, I don't know?
 8 **A. Yes.**
 9 **Q.** And then you make the call and tell the
 10 dispatcher the nurse told you to call?
 11 **A. I said that, but I was just answering her**
 12 **question at the time. The nurse did not tell me to**
 13 **call.**
 14 THE COURT: Would this be a good time for
 15 break?
 16 MR. KELLY: Yes.
 17 THE COURT: Ladies and gentlemen, we will take
 18 the afternoon recess. Remember the admonition.
 19 Please be reassembled at 20 after, about 20
 20 minutes. You are excused at this time.
 21 (Recess taken.)
 22 The record will show the presence of the
 23 defendant, Mr. Ray; the attorneys, and the jury.
 24 Ms. Mercer is on the witness stand.
 25 Mr. Kelly.

1 MR. KELLY: Thank you, Judge.
 2 **Q.** Ms. Mercer, right before the break, I
 3 believe we were talking about the 9-1-1 call that
 4 you placed and my client's statements in regards to
 5 the location of Melinda. Or excuse me. Megan.
 6 Correct?
 7 **A. Yes.**
 8 **Q.** After the sweat lodge ended, did you ever
 9 meet a lady by the name of Dr. Jeanne Armstrong?
 10 **A. Not that I'm aware of.**
 11 **Q.** Were you aware of a lady who identified
 12 herself as a doctor after the sweat lodge?
 13 **A. Not that I remember.**
 14 **Q.** Were you aware of a lady who identified
 15 herself as a doctor who was directing on how to do
 16 CPR on James and Kirby?
 17 **A. I wasn't around there when they were**
 18 **doing the CPR.**
 19 **Q.** Did you know that a lady by the name of
 20 Melinda Martin was conducting CPR on Kirby?
 21 **A. No, I did not.**
 22 **Q.** Were you aware that Dr. Armstrong gave
 23 specific instructions to my client as to how to
 24 help the emergency situation that was taking place?
 25 **A. No, I do not.**

1 Q. Are you aware that the doctor said go
2 look for something called an "AED," and Mr. Ray did
3 that?

4 A. **No, I did not.**

5 Q. We talked about this a moment ago. After
6 the EMS providers and the Yavapai County Sheriff's
7 Office arrived, you and your husband and Sarah and
8 Fawn went to your house?

9 A. **Correct.**

10 Q. And you told us exactly what you had for
11 dinner? I think it was --

12 A. **We did not have dinner. We planned to
13 have dinner after the sweat lodge, but we never
14 were able to do that. And that was one of the
15 reasons I became ill. Because I didn't eat dinner.**

16 Q. But you had told us specifically what you
17 had planned?

18 A. **We had planned steak and shrimp.**

19 Q. Steak and shrimp for dinner. At that
20 point in time an EMS guy shows up, and you go to
21 the Sedona Medical Center; correct?

22 A. **Yes.**

23 Q. And it was at the Sedona Medical Center
24 that you told the detective that the only specific
25 problems that you heard inside the sweat lodge were

1 people moaning and groaning, people breathing hard,
2 James saying, you need to slow your breathing down,
3 but that was normal. Correct?

4 A. **Yes.**

5 Q. You didn't talk about any of the specific
6 statements that you told this jury over the last
7 day and a half; correct?

8 A. **Correct.**

9 Q. And that statement was provided before
10 Detective Diskin told you to get a lawyer; correct?

11 A. **Yes.**

12 Q. Because Detective Diskin had that
13 conversation on October 9th. Excuse me. On
14 October 19, 2009; correct?

15 A. **Correct.**

16 Q. And it was during that conversation that
17 the detective said that there would be no criminal
18 charges or criminal liability for you and your
19 husband; correct?

20 A. **No.**

21 MR. KELLY: Your Honor, I'd ask to play
22 exhibit -- excuse me. Clip No. 6 of Exhibit 895.
23 And it is a clip from Exhibit 677, page 3, line 16,
24 through page 4, line 4.

25 THE COURT: Ms. Polk.

1 MS. POLK: May I have a moment, Your Honor?

2 THE COURT: Yes.

3 MS. POLK: Your Honor, this clip contains
4 issues beyond the question posed to the witness.
5 However, the state would move that the entire
6 transcript be admitted into evidence. And that
7 would be Exhibit 677.

8 THE COURT: Mr. Kelly.

9 MR. KELLY: Judge, I'd object to the
10 admission. And, again, I'm using it as a prior
11 inconsistent statement on cross-examination.

12 MS. POLK: Your Honor, the statement -- what
13 he's referring to is an excerpt and does not
14 pertain to the question specifically asked.

15 But rather than play excerpts, I would
16 request the entire audio and the transcript just be
17 admitted.

18 THE COURT: That can either happen if there is
19 a stipulation.

20 Or, Mr. Kelly, you can play the excerpt
21 that relates directly to the question.

22 MS. POLK: Your Honor, the only --

23 MR. KELLY: May I ask some additional
24 questions?

25 THE COURT: Go ahead, Ms. Polk.

1 MS. POLK: The lines that would pertain
2 directly to this issue of what Detective Diskin
3 said would be page 3, lines 16 and 17, and then
4 page 4, lines 2 to 4.

5 MR. KELLY: Judge, it's a clip. And we can go
6 through and excise this other extraneous stuff.

7 THE COURT: Can I see the transcript from
8 line 16, page 3, to line 4, page 4?

9 I'm going to allow the playing of that
10 particular clip.

11 MS. POLK: Your Honor, the state would request
12 on page 4 through line 17 be played.

13 THE COURT: Through line 17?

14 MS. POLK: Yes.

15 MR. KELLY: Judge, the clip was prepared in
16 anticipation of cross. We don't have the ability
17 to do that.

18 THE COURT: Ms. Polk, in redirect you can
19 complete that passage. I will permit the playing
20 of the indicated portion at this time.

21 MR. KELLY: Judge, for the record, again, it's
22 what's been marked as Exhibit 785, clip 6.

23 (Exhibit 785 played.)

24 Q. BY MR. KELLY: Ms. Mercer, does that
25 refresh your recollection as to the conversation

1 which took place on October 19 between you, the
2 detective and your husband?

3 **A. That part of the conversation.**

4 **Q.** And you have an attorney today; correct?

5 **A. Yes.**

6 **Q.** And your testimony and statements as --
7 excuse me. Your testimony as to the statements
8 attributed to my client came after that date;
9 correct?

10 **A. Which date?**

11 **Q.** October 8 and 19, 2009; correct?

12 **A. No. October 19 --**

13 **Q.** Do you recall the clip we played before
14 the break about your testimony or your statement
15 made to Detective Edgerton at the Sedona Medical
16 Center?

17 **A. Yes.**

18 **Q.** And the question was, did you hear
19 anybody in there having any specific problems? Do
20 you recall that question?

21 **A. Yes.**

22 **Q.** And your response was, you hear moaning
23 and groaning and people breathing hard, and then --
24 you know -- James will tell you to slow your
25 breathing down, but that's normal. Correct?

1 **A. Yes.**

2 **Q.** After that date on October 19, 2009, you
3 heard the detective tell you that you should get a
4 civil attorney; correct?

5 **A. Correct.**

6 **Q.** And that you were not going to be
7 charged; correct?

8 **A. Correct.**

9 **Q.** It was after that date, yesterday and
10 today, that you have now additional statements that
11 were purportedly made by my client; correct?

12 **A. No. On the statement of my interview**
13 **with Detective Diskin, the next day, I believe, I**
14 **told him about one of the conversations I heard.**
15 **And every time I was interviewed, I was told if you**
16 **remember anything more or if you think of anything**
17 **else, please let us know. It's an ongoing**
18 **investigation.**

19 **Q.** As you are thinking about something else,
20 you're present with your husband; correct?

21 **A. When are we talking about?**

22 **Q.** After October 8, 2009.

23 **A. Just any day?**

24 **Q.** Yes.

25 **A. Okay.**

1 **Q.** Still married to Ted Mercer; correct?

2 **A. Yes.**

3 **Q.** And Sarah is still your daughter;
4 correct?

5 **A. Yes.**

6 **Q.** Fawn is still your friend; correct?

7 **A. Yes.**

8 **Q.** None of those four ever entered the sweat
9 lodge; correct?

10 **A. During the sweat lodge, no, we did not.**

11 **Q.** And you were told to get a civil attorney
12 in case someone sued you because you and your
13 husband had constructed it; correct?

14 **A. Yes.**

15 **Q.** Now, on October 9, 2009, do you recall
16 telling Detective Diskin -- let me make sure I have
17 the right date.

18 On October 9, 2009, do you recall telling
19 the detective that you had photographs of previous
20 sweat lodges?

21 **A. Yes.**

22 **Q.** And that there is 40 people across there
23 laying, convulsing, throwing up, crying, eyes
24 rolling back?

25 **A. Yes.**

1 **Q.** You made that statement?

2 **A. I did.**

3 MR. KELLY: Your Honor, I'd ask to play clip
4 No. 5 in Exhibit 785. And it is an excerpt from
5 Exhibit 674, page 7, lines 23 through 26. If I
6 may?

7 MS. POLK: No objection, Your Honor.

8 THE COURT: That excerpt will be played.

9 (Exhibit 785 played.)

10 MR. KELLY: Judge, may I play that again?

11 THE COURT: Yes.

12 (Exhibit 785 played.)

13 **Q.** BY MR. KELLY: Do you remember making
14 that statement to the detective?

15 **A. Yes.**

16 **Q.** You told him you have photographs from
17 prior sweat lodges where people have been throwing
18 up; correct?

19 **A. Prior James Ray events.**

20 **Q.** Talking about James Ray events. And
21 there were 40 people throwing up?

22 **A. That's what I said.**

23 **Q.** Now, in 2007 you were not in charge of --
24 you or your husband were working under Gary Palisch
25 as the fire tender; correct?

- 1 **A. Correct.**
 2 **Q.** So you were not in charge of the
 3 activities outside the sweat lodge? You were
 4 helping someone else; correct?
 5 **A. Correct.**
 6 **Q.** And Gary was inexperienced in this
 7 regard; correct?
 8 **A. I know he had done it before.**
 9 **Q.** He was the fire tender, and you were
 10 learning from him?
 11 **A. Correct.**
 12 **Q.** He had done many lodges before this;
 13 correct?
 14 **A. I assumed he had.**
 15 **Q.** He was helping you or teaching you in
 16 what to do; correct?
 17 **A. No. I mean that wasn't his intention.**
 18 **That wasn't said you here, and I'm training you. I**
 19 **was just there, and I was picking up things that**
 20 **were going on. But it was never an intent you're**
 21 **going to learn how to do this. This is what you**
 22 **need to do. I was just there. And so yeah. I**
 23 **was -- I mean --**
 24 **Q.** So let me get this straight. If Gary
 25 Palisch has not taught you, then you had no

- 1 instruction before you were the door keeper and
 2 your husband was the fire tender in 2008 and 2009.
 3 Fair statement?
 4 **A. My training was doing prior -- other**
 5 **sweat lodges as an assistant.**
 6 **Q.** Other than the one with Gary Palisch?
 7 **A. Yes.**
 8 **Q.** You --
 9 **A. No. No. I'm sorry. Gary Palisch. I**
 10 **thought you meant other than James Ray.**
 11 **Q.** No.
 12 **A. I'm sorry. I misunderstood the question.**
 13 **I misheard it.**
 14 **Q.** We heard you on direct examination
 15 describe your observations from 2007. Do you
 16 recall that?
 17 **A. Yes.**
 18 **Q.** And Gary Palisch, this experienced fire
 19 tender, was not alarmed; correct?
 20 **A. No.**
 21 **Q.** That isn't correct?
 22 **A. No. He -- he was not alarmed. Correct.**
 23 **Q.** He told you that it was normal that
 24 people threw up in sweat lodges. Do you recall
 25 that?

- 1 **A. Yes.**
 2 **Q.** Ted was certified as an EMS responder
 3 back in 2007; correct?
 4 **A. I believe so. I'm not positive.**
 5 **Q.** Gary didn't call for any medical
 6 assistance; correct?
 7 **A. No.**
 8 **Q.** Ted didn't call for any medical
 9 assistance?
 10 **A. Correct.**
 11 **Q.** You didn't; correct?
 12 **A. Correct.**
 13 **Q.** And you told us about three
 14 recollections. The first one was some woman you
 15 don't know got to the door, tried to stand up and
 16 fell; correct?
 17 **A. Yes.**
 18 **Q.** Now, do you recall two people, by the
 19 name of Dr. Byron, Matt Byron, and lady by the name
 20 of Sandy, helping her?
 21 **A. No.**
 22 **Q.** You would agree with me that if a person
 23 is hot and has been in a prone or sitting position
 24 for a time period, if they stand up too quick, they
 25 might faint; correct?

- 1 **A. Correct.**
 2 **Q.** So it's important in a sweat lodge to
 3 keep them down; correct?
 4 **A. Yes.**
 5 **Q.** And in this particular situation, do you
 6 remember Dr. Byron and Sandy helping this lady?
 7 **A. No, I don't.**
 8 **Q.** Do you have any reason to dispute their
 9 testimony if they were to testify --
 10 **A. No, I don't.**
 11 **Q.** Then the second recollection was the man
 12 who said he was having an anxiety attack or
 13 something to that effect; correct?
 14 **A. His heart was scaring him. Yes.**
 15 **Q.** And when his heart was scaring him, he
 16 said, get me to the water, and he ran some hundred
 17 yards, is your testimony, to Oak Creek; correct?
 18 **A. He didn't run. I was helping him. Yes.**
 19 **Q.** Well, you said plowed his way through to
 20 Oak Creek.
 21 **A. Yes. With my assistance.**
 22 **Q.** When he was in the water, a friend came
 23 up, and then you left; correct?
 24 **A. Yes.**
 25 **Q.** So in 2007 you have water by the sweat

1 lodge?
 2 **A. Yes.**
 3 **Q.** You had a hose; correct?
 4 **A. Yes.**
 5 **Q.** You had the same drinking water
 6 available; correct?
 7 **A. Yes.**
 8 **Q.** And this man chose to go to the creek
 9 instead of using the water from the hose; correct?
 10 **A. Yes.**
 11 **Q.** And then the third recollection that you
 12 told us about is that people came out, they wiped
 13 their face off, and you gave them water. Do you
 14 recall that?
 15 **A. Yes.**
 16 **Q.** You didn't see any foaming from the mouth
 17 in 2007; correct?
 18 **A. Correct.**
 19 **Q.** You didn't see any pinpoint pupils in
 20 their eyes; correct?
 21 **A. Pinpoint pupils?**
 22 **Q.** Do you know what that is? Little, small
 23 pupils in your eyes.
 24 **A. I wouldn't know to look for pinpoint.**
 25 **No. I didn't look in their pupils.**

1 **Q.** So you have literally no medical
 2 training; correct?
 3 **A. Yes.**
 4 **Q.** And this jury shouldn't assume you're
 5 providing a medical opinion as to the condition of
 6 any participant in 2007; correct?
 7 **A. I'm giving my personal opinion without**
 8 **any medical.**
 9 **Q.** And that's true for 2008; correct?
 10 **A. Yes.**
 11 **Q.** And that's true for 2009; correct?
 12 **A. Yes.**
 13 **Q.** Would you agree with your husband that
 14 what you observed in 2007 and 2008 were,
 15 essentially, the same?
 16 **A. No.**
 17 **Q.** No?
 18 **A. People died -- oh. In 2007, 2008.**
 19 **Essentially. Yes, I would agree.**
 20 **Q.** And you told the detective, and we just
 21 heard a portion in the clip, that there were 40
 22 people convulsing, throwing up, crying, eyes
 23 rolling back in their head; correct?
 24 **A. Correct.**
 25 **Q.** And you told him that you will be able to

1 tell from the pictures it looks like a disaster
 2 scene; correct?
 3 **A. Correct.**
 4 **Q.** And --
 5 **A. I exaggerated.**
 6 **Q.** You did, didn't you?
 7 **A. Yes.**
 8 **Q.** Quite a bit; correct?
 9 **A. You're opinion. I mean --**
 10 **Q.** I want your opinion.
 11 **A. My opinion is I wanted him to get a clear**
 12 **picture of what it looked like after the sweat**
 13 **lodge. That was my intention.**
 14 **Q.** I've heard -- maybe you've heard of this
 15 phrase: A picture speaks a thousand words. You
 16 heard of that?
 17 **A. Yes.**
 18 **Q.** And would you agree with me that you
 19 exaggerated when you told Detective Diskin you had
 20 photographs depicting what happened in 2007
 21 and 2008?
 22 **A. No. I would agree that I exaggerated**
 23 **when I said there was 40 people laying around**
 24 **convulsing and eyes rolling back in their head. I**
 25 **agree that was an exaggeration. But --**

1 **Q.** Let's take Exhibit 849 as an example.
 2 **A. Okay.**
 3 **Q.** Those folks are not convulsing; correct?
 4 **A. I don't know when that picture was taken.**
 5 **But no, they're not.**
 6 **Q.** They're not throwing up; correct?
 7 **A. No.**
 8 **Q.** Their eyes are not rolled back in their
 9 head; correct?
 10 **A. No, they're not.**
 11 **Q.** In fact, they're smiling; correct?
 12 **A. Correct.**
 13 **Q.** And in 2008 these photographs -- you
 14 volunteered the photographs to Detective Diskin to
 15 help with his prosecution of James Ray; correct?
 16 **A. At that time I didn't know that there**
 17 **was -- that he was being charged, I don't think. I**
 18 **knew there was an investigation underway, and I**
 19 **wanted to do whatever I could to paint the picture**
 20 **of the -- I wanted to paint the picture.**
 21 **Q.** The detective didn't even ask you for the
 22 photographs. You volunteered them; correct?
 23 **A. Correct.**
 24 **Q.** You said I have these photographs, and
 25 you gave them to the detective?

- 1 **A. Yes.**
 2 **Q.** And you described it as 40 people
 3 convulsing, eyes rolled back in head, passed out;
 4 correct?
 5 **A. Correct.**
 6 **Q.** And now you're telling this jury that
 7 well, these folks had time to recover, so the
 8 pictures don't speak a thousand words; correct?
 9 **A. Correct.**
 10 **Q.** So take a look at Exhibit 871. Now, this
 11 guy is smiling; correct?
 12 **A. Yes.**
 13 **Q.** Very red; correct?
 14 **A. Red?**
 15 **Q.** Red. Skin. Tint. Red.
 16 **A. Yes.**
 17 **Q.** And you would agree with me when people
 18 get hot, like in a sweat lodge, their skin may turn
 19 red; correct?
 20 **A. In that extreme of a sweat lodge, yes.**
 21 **Q.** So this guy was hot. His skin turns red,
 22 and he comes out of the sweat lodge; correct?
 23 **A. Correct.**
 24 **Q.** You see the people spraying water behind
 25 him?

- 1 **A. Yes.**
 2 **Q.** And when people come out of the sweat
 3 lodge and they're red and they're hot, they
 4 immediately spray them with water to cool them
 5 down; correct?
 6 **A. Yes.**
 7 **Q.** Now, I don't see him convulsing. Do you?
 8 **A. No.**
 9 **Q.** His eyes are not rolled in the back of
 10 his head; correct?
 11 **A. No.**
 12 **Q.** And you don't have any reason to dispute
 13 that this photograph was taken shortly after the
 14 end of the sweat lodge; correct?
 15 **A. No.**
 16 **Q.** Because people would not be spraying
 17 water in the fall in Central Arizona some 45
 18 minutes or an hour later on somebody, would they?
 19 **A. Yes.**
 20 **Q.** You think so?
 21 **A. Well, I won't dispute what you're saying.**
 22 **Q.** Now, when you talk about the photographs
 23 that you provided to the detective, you told us
 24 that your friend, Anita, was also present; is that
 25 correct?

- 1 **A. Yes. That's why I took the pictures.**
 2 **Q.** And Anita took some of the photographs?
 3 **A. Yes.**
 4 **Q.** And you don't know which ones she took,
 5 and you don't know which ones you took; correct?
 6 **A. Correct.**
 7 **Q.** And she -- there is no way for us to tell
 8 today from the photographs the time; correct?
 9 **A. Correct.**
 10 **Q.** In other words, what I mean is, down here
 11 at the bottom of some of these photographs,
 12 sometimes there is a date and time. But we don't
 13 have that advantage; correct?
 14 **A. Well, on my computer it logs the date and**
 15 **time that the picture was taken. But on the**
 16 **picture it doesn't show it.**
 17 **Q.** Right. You didn't give that information
 18 to the detective; correct?
 19 **A. Correct.**
 20 **Q.** You don't know the sequence of the
 21 photographs that you gave to Detective Diskin;
 22 correct?
 23 **A. Right now, no. I don't.**
 24 **Q.** And you don't know in that sequence which
 25 ones Anita took and which ones you took; correct?

- 1 **A. Correct.**
 2 **Q.** Now --
 3 **A. Is this one of my pictures?**
 4 **Q.** I don't think so.
 5 I'm going to ask you, Ms. Mercer, to take
 6 a look at exhibits beginning with 841.
 7 That's a picture you took; correct?
 8 **A. That's a picture taken with my camera and**
 9 **one I submitted to Detective Diskin. But obviously**
 10 **I don't know if I took it.**
 11 **Q.** Thank you. This is -- let's rephrase
 12 these questions. This is one of your pictures,
 13 meaning it was either taken by you or Anita?
 14 **A. It looks familiar. Yes.**
 15 **Q.** And 842. It's one of your pictures;
 16 correct?
 17 **A. Yes.**
 18 **Q.** 843. One of your pictures; correct?
 19 **A. Yes.**
 20 **Q.** 844. One of your pictures; correct?
 21 **A. It hasn't changed -- oh. Yes.**
 22 **Q.** 845; correct?
 23 **A. Yes.**
 24 **Q.** 846. One of your pictures; correct?
 25 **A. Yes.**

1 Q. 847; correct?
 2 A. Yes.
 3 Q. And, finally, 848; correct?
 4 A. Yes.
 5 Q. Now --
 6 And we can pull them.
 7 you can study them if you'd like. But I didn't see
 8 any evidence on the ground in any of those
 9 photographs that someone had thrown up. Did you?
 10 A. No.
 11 Q. Now, you're probably thinking the water
 12 can wash it away; correct?
 13 A. I'm thinking it would be difficult to
 14 tell. And the amount they threw up wasn't gobs.
 15 It wasn't, like, buckets. It was, like, the green
 16 icky stuff. Smaller amounts.
 17 Q. My question is real simple.
 18 A. I don't know that you can see that or
 19 not. I'm not going to argue with you.
 20 MR. KELLY: Let's blow up a portion plus
 21 through the ground right in there.
 22 Q. When I've blown them up, I can't find any
 23 vomit anywhere. My question to you, can you point
 24 out to this jury anyplace where you can identify
 25 the vomit that you told this detective about on

1 October 9, 2009?
 2 A. No.
 3 Q. Okay. I don't see 40 people in distress
 4 either. Do you?
 5 A. No.
 6 Q. And I don't see anyone with their eyes
 7 rolled back. Do you?
 8 A. I can't tell from this picture.
 9 Q. Now, one thing and --
 10 A. I know it was going on. So, I mean, the
 11 picture is a moment in time, whereas I was
 12 experiencing the whole time.
 13 Q. I want you to direct your memory back to
 14 your testimony on the direct examination about a
 15 girl, an Asian girl, that got sick.
 16 Do you recall your testimony?
 17 A. Yes.
 18 MR. KELLY: Let's take a look at, I believe --
 19 I think it's 875.
 20 THE WITNESS: I don't think I said she was
 21 Asian, though. I said I knew I could recognize her
 22 being short and dark haired.
 23 Q. BY MR. KELLY: Do you think that's her on
 24 the right? Says, Dream Team, on her T-shirt?
 25 A. I don't know.

1 Q. She's looking very -- the lady in 875 is
 2 looking pretty healthy and happy; correct?
 3 A. You mean this one here?
 4 Q. Yes.
 5 A. Yes.
 6 Q. And here's my question: Do you recall
 7 that before the afternoon break last week, you told
 8 us that this lady was a participant in 2008? Do
 9 you recall that testimony?
 10 A. I don't know that I was talking about
 11 that lady. But I recall talking about the lady
 12 having convulsions that I described as being short
 13 hair.
 14 Q. Listen to my question. It's about the
 15 year. Do you recall before the afternoon break,
 16 you said that this lady you were describing was a
 17 participant in 2008? Do you recall that testimony?
 18 A. From that question, I guess, no. I don't
 19 know where you're going.
 20 Q. Do you recall that after the break you
 21 said the lady was a participant in 2007?
 22 A. You're confusing me. I'm confused by --
 23 I don't know.
 24 Q. Do you recall telling the jury about the
 25 lady that you described who got sick? Do you

1 recall that testimony?
 2 A. In 2007?
 3 Q. Listen to my questions. Do you recall
 4 your testimony last week about a lady getting sick?
 5 A. What year?
 6 Q. Please try to answer my question. Do you
 7 recall that testimony?
 8 MS. POLK: Your Honor, could counsel turn off
 9 his buzzing.
 10 THE COURT: Please, Mr. Kelly.
 11 MR. KELLY: Thank you, Judge.
 12 THE WITNESS: Yes.
 13 Q. BY MR. KELLY: Now, my question is this:
 14 Do you recall that before the break you said the
 15 lady got sick in 2008, and after the break you said
 16 she got sick in 2007? Do you recall that
 17 testimony?
 18 If you don't, it's okay.
 19 A. No.
 20 Q. Do you recall me asking to voir dire you
 21 as a witness from the stand here?
 22 A. What?
 23 Q. Do you recall me standing up and asking
 24 you -- to be able to voir dire asking you
 25 questions, and the Court denied the request? Do

1 you recall any of that?
 2 **A. Yes.**
 3 **Q.** Do you recall talking to Ms. Polk during
 4 the break?
 5 **A. Yesterday?**
 6 **Q.** Last week.
 7 **A. Yes.**
 8 **Q.** And after talking to Ms. Polk, then
 9 correcting your testimony to fit into the exhibits?
 10 **A. You mean when I said that I heard -- I**
 11 **said -- what I said is different than what I heard?**
 12 **Q.** No. The years. Before the break you
 13 said it was 08; correct?
 14 **A. What was in '08?**
 15 **Q.** After the break you said the lady got
 16 sick in 2007; correct?
 17 **A. Okay.**
 18 **Q.** During the break you spoke with Ms. Polk;
 19 correct?
 20 MS. POLK: Your Honor, if counsel could
 21 clarify what day he is referring to.
 22 THE WITNESS: I'm lost.
 23 THE COURT: Start again, Mr. Kelly. Go ahead
 24 and start your line of questioning.
 25 **Q.** BY MR. KELLY: Ms. Mercer, do you recall

1 your direct testimony last week?
 2 **A. Yes.**
 3 **Q.** Do you recall your question by Yavapai
 4 County Attorney, Sheila Polk? The lady in the red.
 5 Do you recall that?
 6 **A. Are you asking me if I recall a question?**
 7 **Yes. Yes.**
 8 **Q.** Do you recall during that questioning you
 9 discussed what happened in 2008 during a James Ray
 10 International sweat lodge event?
 11 **A. Yes.**
 12 **Q.** Do you recall that, while discussing
 13 the 2008 James Ray International sweat lodge event,
 14 you described a lady who became ill?
 15 **A. Yes.**
 16 **Q.** Do you recall we took a break in the
 17 afternoon?
 18 **A. Yes.**
 19 **Q.** Do you recall after the break you were
 20 led through a series of questions and said no? I
 21 was wrong? It was 2007? Do you recall it?
 22 **A. Yes.**
 23 **Q.** And you spoke to the prosecutor during
 24 the break; correct?
 25 **A. The afternoon break or the lunch break?**

1 **Q.** Afternoon break.
 2 **A. I don't remember.**
 3 **Q.** Well, you would agree with me that the
 4 ladies in Exhibit 875 don't appear to be in any
 5 type of physiological distress; correct?
 6 **A. Correct.**
 7 **Q.** And you don't have any reason to dispute
 8 that this photograph was taken in 2008, do you?
 9 **A. No. She doesn't look real happy. But --**
 10 **Q.** Well, let's talk about that for a minute.
 11 I don't look real happy right now, do I?
 12 Ms. Mercer, look at me. Do I look happy?
 13 MS. POLK: Your Honor, that's improper.
 14 THE COURT: Sustained as argumentative.
 15 **Q.** BY MR. KELLY: Ms. Mercer, you don't know
 16 whether that person is happy or not, do you?
 17 **A. The look on their face would tell me**
 18 **they're not happy at the moment the picture is**
 19 **taken.**
 20 **Q.** This is one of those assumptions you're
 21 making; correct?
 22 **A. You're asking me to --**
 23 MR. KELLY: Your Honor, I'd ask the witness to
 24 answer the question.
 25 **Q.** This is an assumption you're making;

1 correct?
 2 **A. Yes.**
 3 **Q.** You're guessing; correct?
 4 **A. Yes.**
 5 **Q.** You've never interviewed that lady;
 6 correct?
 7 **A. No.**
 8 **Q.** You don't know who she is; correct?
 9 **A. No, I don't.**
 10 **Q.** You don't know what she's thinking after
 11 this sweat lodge; correct? Correct?
 12 **A. Correct.**
 13 **Q.** But you're willing to jump to the
 14 conclusion and tell the jury that she's not happy;
 15 correct?
 16 **A. That's my opinion.**
 17 **Q.** And that's your testimony throughout the
 18 last two days; correct?
 19 MS. POLK: Objection, Judge.
 20 THE COURT: Sustained.
 21 MR. KELLY: You've made the same assumptions
 22 during the past two days in your testimony;
 23 correct?
 24 MS. POLK: Objection, Judge. No foundation.
 25 THE COURT: Overruled.

1 You may answer that if you can.
 2 THE WITNESS: I don't understand the question.
 3 Q. BY MR. KELLY: You've provided opinions
 4 as to people's states of mind throughout your
 5 testimony without having ever spoken to them;
 6 correct?
 7 A. **Correct.**
 8 Q. Without ever knowing who they were;
 9 correct?
 10 A. **Yes.**
 11 Q. Without ever knowing what they were
 12 feeling; correct?
 13 A. **Other than being there with them at the**
 14 **time, yes.**
 15 Q. In 2008 you were not alarmed enough to
 16 call 9-1-1; correct?
 17 A. **No. Correct.**
 18 Q. Your husband did not call 9-1-1; correct?
 19 A. **Correct.**
 20 Q. Anyone from Angel Valley did not call
 21 9-1-1; correct?
 22 A. **Correct.**
 23 MR. KELLY: And if we take a look at
 24 Exhibit 849.
 25 Q. And those people would not provide you --

1 their appearance would not provide any basis for
 2 you to be alarmed; correct?
 3 A. **Correct.**
 4 Q. Take a look at 850. Those people don't
 5 cause any concern on your part; correct?
 6 A. **Correct.**
 7 Q. 851. Those people are no reason for any
 8 alarm or concern; correct?
 9 A. **Correct.**
 10 Q. 852. Or, excuse me. 853. That guy
 11 looks pretty happy; correct?
 12 A. **Correct.**
 13 Q. 855. No cause for any alarm; correct?
 14 A. **With these two?**
 15 Q. **Correct.**
 16 A. **Yes.**
 17 Q. I can see your husband back there. He's
 18 not calling 9-1-1 --
 19 A. **I can't tell what he's doing. It looks**
 20 **like someone's laying down there, and someone is**
 21 **tending to them.**
 22 Q. So this is one of those assumptions
 23 you're making; correct?
 24 A. **Yes.**
 25 Q. And 858. That guy doesn't look like

1 there is any reason to call anyone or any reason
 2 for alarm; correct?
 3 A. **The one standing in front is smiling.**
 4 Q. None of them appear to --
 5 A. **There is something going on back here you**
 6 **can't see. But yes. Most of them are standing up.**
 7 Q. And, again, as to these people back here,
 8 ma'am, you have no idea. It's a guess or an
 9 assumption you're making; correct?
 10 A. **From the picture. But I was there.**
 11 Q. We understand. And you told us a few
 12 minutes ago that you were exaggerating as to what
 13 happened. Do you recall that testimony?
 14 A. **I exaggerated to the policeman. Yes.**
 15 Q. Okay.
 16 Let's take a look at 859.
 17 That lady looks pretty happy; correct?
 18 A. **The one standing up.**
 19 Q. Okay. Well, you don't know about the one
 20 laying down, do you?
 21 A. **I don't think that's fair you can ask me**
 22 **what this one feels like and not -- ask my**
 23 **assumption of this one and not my assumption of**
 24 **this one. Why can I make -- why do you want my**
 25 **assumption of this one?**

1 THE COURT: Ms. Mercer, we're going to have a
 2 question and an answer, in that format.
 3 Q. BY MR. KELLY: The lady standing up in
 4 859. Would she cause you any reason to call 9-1-1?
 5 A. **No.**
 6 Q. Would she cause you any reason to believe
 7 that there was some alarm on your part as to her
 8 well being?
 9 A. **No.**
 10 Q. The lady laying down that you
 11 identified -- did you call 9-1-1?
 12 A. **No.**
 13 Q. Did she cause you some type of alarm?
 14 concern?
 15 A. **Yes.**
 16 Q. Then why didn't you call 9-1-1?
 17 A. **It's James Ray's international event.**
 18 **And before I did call 9-1-1 on the evening of the**
 19 **sweat lodge.**
 20 MS. POLK: Your Honor, could the witness
 21 finish her answer?
 22 MR. KELLY: Your Honor, she answered the
 23 question.
 24 MS. POLK: No, Your Honor --
 25 THE COURT: Had you completed your answer to

1 the question?

2 THE WITNESS: No.

3 THE COURT: You may complete it.

4 MR. KELLY: May I rephrase it?

5 Q. Did you call 9-1-1 for the lady that was
6 laying in this photograph?

7 MS. POLK: Your Honor, objection. The witness
8 had started to answer. Mr. Kelly cut her off. The
9 Court sustained my objection. And I would like her
10 to finish her answer.

11 THE COURT: There was a standing question.
12 And you may answer that.

13 Q. BY MR. KELLY: You didn't call 9-1-1, did
14 you?

15 A. **I called 9-1-1 after it was apparent that**
16 **people who were in charge were not taking that**
17 **action.**

18 Q. Ms. Mercer, do you understand this
19 is 2008?

20 A. **Yes. But the question carried on, and I**
21 **thought we had gone --**

22 Q. No. I'm asking about 2008. No one
23 called 9-1-1; correct?

24 A. **Correct.**

25 Q. So no one was alarmed enough to call

1 9-1-1, including you?

2 A. **Correct.**

3 Q. Including your husband?

4 A. **Correct.**

5 Q. Including Mr. and Mrs. Hamilton; correct?

6 A. **Correct.**

7 MR. KELLY: Can we take a look at 868?

8 Q. Now, this lady is one of the ladies that
9 was being helped by a Dream Team member on the
10 right; correct?

11 A. **Yes.**

12 Q. And see the people in the back?

13 A. **Yes.**

14 Q. No one called 9-1-1; correct?

15 A. **Correct.**

16 Q. 870. We've seen that.

17 871. No one thought that this guy would
18 be a reason to call 9-1-1?

19 A. **Correct.**

20 Q. 872. These folks look pretty happy,
21 don't they? I'll rephrase my question. This lady
22 playing games with the water hose -- you wouldn't
23 call 9-1-1 given her condition; correct?

24 A. **No.**

25 Q. You wouldn't call 9-1-1 on any of the

1 other three individuals; correct?

2 A. **Not in this photo.**

3 Q. And if they were laying down and taken
4 from a distance, you might have a mistaken
5 assumption as to their physical condition. Fair
6 statement?

7 A. **Yes.**

8 Q. 873. These ladies wouldn't cause you any
9 reason to call 9-1-1; correct?

10 A. **No.**

11 Q. 874. Same lady. No reason to call
12 9-1-1; correct?

13 A. **Correct.**

14 Q. 875. We've looked at it.

15 876. Lady looks healthy; correct?

16 A. **Yes and no.**

17 Q. She doesn't?

18 A. **Well, she looks healthy. But when you**
19 **talk to people and they don't know their name or**
20 **what day it is, that's when you --**

21 Q. Who is this lady?

22 A. **I don't know.**

23 Q. Did you talk to her?

24 A. **I believe I did. I don't know. I know I**
25 **talked to a lot of people who didn't know who they**

1 **were after being in the sweat lodge.**

2 Q. So you're testimony today in front of
3 this jury is that this lady in Exhibit 878 did not
4 know who she was?

5 A. **No.**

6 Q. Okay. So, again, what you're doing is
7 exaggerating, making assumptions, guessing;
8 correct?

9 A. **No. Completing the picture.**

10 Q. You want my client to be convicted;
11 correct?

12 A. **No. I want the jury to make a decision**
13 **based on the facts.**

14 Q. You're concerned about liability, so you
15 hired an attorney; correct?

16 A. **I was concerned. Yes.**

17 Q. 879.

18 A. **No. I didn't hire -- well. Sorry.**

19 Q. She volunteered.

20 879. Now, I believe Ms. Polk and you
21 discussed this picture. It's the one lady in the
22 green shorts; correct?

23 A. **Yes. I see the lady in the green shorts.**

24 Q. No one called 9-1-1; correct?

25 A. **No.**

1 Q. No one took her to the hospital?
 2 A. No.
 3 Q. And then Exhibit 862.
 4 If we could blow up to the two people in
 5 the background.
 6 That's you; right?
 7 A. Yes. Well, no. I don't think it is me.
 8 I wouldn't wear that. That's not me.
 9 Q. That's not you with the camera?
 10 A. It is me. That had to be a while after,
 11 because I would not have my shirt on like that.
 12 Q. You're smiling, aren't you?
 13 A. Yes. Can't quite tell. Looks like a
 14 smile. I think I'm kind of just going like this,
 15 squinting. When I don't have my glasses, I squint.
 16 Q. That's not a smile?
 17 A. I can't tell from the picture.
 18 Q. And that's Anita next to you; correct?
 19 A. Yes.
 20 Q. That's clearly you; correct?
 21 A. Yes. Yes.
 22 MS. POLK: Counsel, could you give me that
 23 exhibit number?
 24 MR. KELLY: 862.
 25 Q. That is Anita next to you; correct?

1 A. Yes.
 2 Q. Now, there are some people in the
 3 foreground, are there not, Ms. Mercer?
 4 A. Yes.
 5 Q. You agreed with me earlier that crazy
 6 Americans are the type of people that like to run
 7 marathons; correct?
 8 A. Can I clarify that "crazy Americans" was
 9 Anita's term. She said she wanted to take pictures
 10 of what the crazy Americans were doing. I
 11 didn't --
 12 Q. I don't want to argue with you. I didn't
 13 make that up. You told us that last week.
 14 A. I did. But they weren't my words.
 15 Q. So crazy Americans are the people who
 16 like to win; correct? You agreed with me at the
 17 beginning of this cross-examination. Crazy
 18 Americans run marathons; correct?
 19 A. Yes.
 20 Q. Climb mountains; correct?
 21 A. Yes.
 22 Q. They work hard to try to earn money;
 23 correct?
 24 A. Yes.
 25 Q. They drive Corvettes and motorcycles;

1 correct?
 2 A. Yes.
 3 Q. And they push themselves to the limits;
 4 right?
 5 A. Yes.
 6 Q. And when they accomplish these goals,
 7 they may express all different types of affect;
 8 correct?
 9 A. Yes.
 10 Q. So there may be people who, as these two
 11 ladies in the foreground of this photograph, are
 12 excited about the accomplishment of making it
 13 through this corporate exercise; correct?
 14 A. Yes.
 15 Q. And it is different than a spiritual
 16 Native American sweat lodge; correct?
 17 A. Yes.
 18 Q. You told us that it was extreme, long,
 19 challenge, like a gauntlet; correct?
 20 A. Yes.
 21 Q. And Native Americans. That's how -- you
 22 understand that that's a challenge, a gauntlet;
 23 correct? Did you know that? That's a Native
 24 American term.
 25 A. No.

1 Q. That's where two people line up with
 2 various weapons, and you try to run through and
 3 make it through. That's a gauntlet. That's a
 4 Native American ceremony. Did you know that?
 5 A. I think my recollection of gauntlet was
 6 something from a movie. But no. I didn't know the
 7 origin of the term.
 8 Q. And these people in this photograph had
 9 just completed one of these JRI corporate exercises
 10 that pushed them to the limits; correct?
 11 A. Correct.
 12 Q. And you would not anticipate that they
 13 would come out of that sweat lodge happy and
 14 cheerful like the brief Native American sweat
 15 lodges you described; correct?
 16 A. Say that again.
 17 Q. You described Native American sweat
 18 lodges that were an hour and a half in length, four
 19 rounds, and they left the door open. Do you recall
 20 that?
 21 A. Yes.
 22 Q. And they added water by pouring water in
 23 a ladle on the rocks; correct?
 24 A. Yes.
 25 Q. And you told us that these were more

1 extreme, they were longer, they were more
 2 challenging, they were like a gauntlet; correct?
 3 **A. Yes.**
 4 **Q.** And they were not as loving as the
 5 ceremonies that you would like to see; correct?
 6 **A. They weren't conducted as a group. It**
 7 **was more like you're on your own journey. You take**
 8 **care of yourself instead of going in as a group.**
 9 **Q.** You actually used the word "loving."
 10 They were not as loving; correct?
 11 **A. Yes.**
 12 **Q.** You personally -- we all have our
 13 preferences. But you personally, you like the
 14 loving ceremonies; correct?
 15 **A. I was there to support people on their**
 16 **journeys, whatever they did. I did not male nude**
 17 **yoga, and I don't have an opinion on whether I**
 18 **would do that. But I set up their ceremonies and**
 19 **helped them.**
 20 **Q.** It's a real simple question.
 21 **A. Yes.**
 22 **Q.** You prefer the loving ceremonies;
 23 correct?
 24 **A. Yes.**
 25 **Q.** And you understand that someone can take

1 a look at the San Francisco peaks here in Central
 2 Arizona, and if you're a Navajo, you may identify
 3 them as part of your spiritual beliefs. You
 4 understand?
 5 **A. Yes.**
 6 **Q.** One of the three corners of the Navajo
 7 Nation. Have you ever heard that?
 8 **A. No.**
 9 MS. POLK: Your Honor, objection. Foundation.
 10 THE COURT: Sustained.
 11 **Q.** BY MR. KELLY: Other people may look at
 12 the San Francisco Peaks and say those are the
 13 highest mountains of Arizona, and I want to climb
 14 them. Correct?
 15 **A. Yes.**
 16 **Q.** And exercising free will, a person can
 17 either worship those mountains or climb the
 18 mountains; correct?
 19 **A. Yes.**
 20 **Q.** And if you climb the mountains, you
 21 assume the risk of injury of climbing; correct?
 22 **A. That would depend.**
 23 **Q.** If you climb the mountains, such as
 24 Denali or Everest, you may even assume the risk of
 25 death; correct?

1 **A. If I climb -- I'm sorry. Can I answer**
 2 **the question. If I climbed Denali or Everest, I**
 3 **wouldn't do it alone. I would pay a guide to take**
 4 **me.**
 5 **Q.** Are you saying that you have to pay a
 6 guide to climb the San Francisco Peaks?
 7 **A. I don't know. I don't know how --**
 8 **Q.** Do you have to pay a guide to ride a
 9 motorcycle?
 10 **A. Me? I would --**
 11 **Q.** Do you have to pay a guide to run a
 12 river?
 13 **A. I would.**
 14 **Q.** Do you have to pay a guide to run a
 15 marathon?
 16 **A. I would. I've never run a marathon.**
 17 **Q.** Do you have to pay a guide to go in the
 18 sweat lodge?
 19 **A. Do you have to pay a guide to go into a**
 20 **sweat lodge? No. Usually they're not paid for.**
 21 **Q.** So if a person is exercising free will in
 22 any of those activities, then they're going to
 23 assume the risk of their conduct; correct?
 24 MS. POLK: Objection to the foundation.
 25 THE COURT: Sustained.

1 **Q.** BY MR. KELLY: Ms. Mercer, on October 8,
 2 2009, you told the detective that you were the door
 3 keeper; correct?
 4 **A. Yes.**
 5 **Q.** You were the closest person to the
 6 participants in the sweat lodge; correct?
 7 **A. Other than the participants.**
 8 **Q.** What you told that detective was you
 9 heard moaning and groaning, and it was normal;
 10 correct?
 11 **A. That's what my transcript said.**
 12 **Q.** That's correct?
 13 **A. Yes.**
 14 **Q.** Thank you, ma'am.
 15 THE COURT: Thank you, Counsel.
 16 Redirect, Ms. Polk?
 17 MS. POLK: Yes, Your Honor. Thank you.
 18 THE COURT: Ladies and gentlemen, feel free to
 19 stand. I'm going to do that myself.
 20 MS. POLK: Thank you, Your Honor.
 21 THE COURT: Yes.
 22 REDIRECT-EXAMINATION
 23 BY MS. POLK:
 24 **Q.** Ms. Mercer, I want to start by asking you
 25 about the interviews that Mr. Kelly was asking you

1 about. And those are the interviews that you had
2 with the various police officers beginning on the
3 evening of October 8 of 2009.

4 **A. Okay.**

5 **Q.** First of all, have you always cooperated
6 with any police officer that you have had any
7 contact with?

8 **A. Yes.**

9 **Q.** And you were asked specifically about the
10 interview that was conducted with Detective Pam
11 Edgerton at the Sedona Medical Center when you were
12 there.

13 Do you recall that?

14 **A. Yes.**

15 **Q.** And you were asked specifically about and
16 a clip was played about the questions regarding the
17 type of wood that was burned.

18 Do you recall those questions from
19 Mr. Kelly?

20 **A. Yes.**

21 **Q.** Do you recall whether or not you spoke
22 with that detective about other things other than
23 the wood?

24 **A. Yes.**

25 **Q.** And do you recall whether you spoke to

1 that detective about other matters before you
2 talked about the wood?

3 **A. I don't understand the question.**

4 **Q.** Mr. Kelly played the clip about the
5 discussion with the detective about the wood.

6 **A. Yes.**

7 **Q.** Do you recall at what point during the
8 interview with the detective you were asked
9 questions about the wood?

10 **A. No. I -- I don't remember that interview
11 much.**

12 **Q.** And if you saw a transcript of that
13 interview, would that help refresh your
14 recollection?

15 **A. Yes.**

16 **Q.** I'm going to show you Exhibit 631 and
17 direct your attention to page 8 and just have you
18 take a moment and read what's on that page.

19 **A. Okay.**

20 **Q.** Does that refresh your recollection as to
21 whether you spoke to the detective about something
22 other than the wood when you were asked what was
23 different?

24 **A. Yes.**

25 **Q.** Will you tell the jury what that was.

1 **A. The buckets of water.**

2 **Q.** And explain that. Would you.

3 **A. The police was asking about the buckets
4 and could anything have been put in the buckets or
5 put in the water. And Ted responds and I respond.**

6 **Q.** Do you recall whether you were asked if
7 Mr. Ray's ceremonies were different from other
8 ceremonies? Do you recall right now whether or not
9 you had a discussion about Mr. Ray's ceremonies
10 compared to other ceremonies?

11 **A. From reading the transcripts, I remember.**

12 **Q.** Well, take a moment to refresh your
13 recollection.

14 **A. Yes. It's right after that.**

15 **Q.** So my question is, during that first
16 interview, did you discuss with the detective
17 things other than just the wood?

18 **A. Yes.**

19 **Q.** And did you discuss whether or not
20 Mr. Ray's ceremonies were different somehow than
21 other ceremonies performed at Angel Valley?

22 **A. Yes.**

23 **Q.** Tell the jury what you told the detective
24 then.

25 **A. Just my statements or --**

1 **Q.** No. Not the whole thing. I just -- I
2 handed you that exhibit to refresh your
3 recollection. You said you do remember now?

4 **A. I remember reading the transcript and
5 reading that I said that they were extreme and
6 hotter and longer than other sweat lodges.**

7 **Q.** Okay. And you were asked questions from
8 Mr. Kelly about whether or not the sweat lodge
9 in 2009 conducted by Mr. Ray was hotter than 2008.

10 Do you remember that question?

11 **A. Today?**

12 **Q.** Yes.

13 **A. Yes.**

14 **Q.** And do you recall telling -- what is your
15 answer to that question?

16 **A. I don't know if it was hotter today.**

17 **Q.** When you discussed that issue of whether
18 or not Mr. Ray's ceremonies were hotter, what were
19 you comparing it to?

20 **A. Other sweat lodges than James Ray's.**

21 **Q.** And how do you know that Mr. Ray's
22 ceremonies are hotter than other -- than ceremonies
23 conducted by other people?

24 **A. The number of the rocks and the
25 conditions of the people, length of time.**

1 Q. Mr. Kelly asked you about the statements
2 you made to the detective about what you heard
3 inside the sweat lodge?

4 A. Yes.

5 Q. And this, again, is the first interview
6 you had when you were at the hospital on October 8?

7 A. Yes.

8 Q. Do you recall what you told the detective
9 then?

10 A. **What Mr. Kelly said, that they were**
11 **making moaning and groaning noises?**

12 Q. Yes.

13 A. Yes.

14 Q. When was it, Ms. Mercer, that you
15 recalled having heard additional things from inside
16 the sweat lodge in 2009?

17 A. **It would have been later that night and**
18 **the next day when I left. I'm not sure what time**
19 **the interview was before we left the property, but**
20 **before that -- during that time.**

21 Q. Do you recall at some point telling your
22 husband, Ted, about what you had heard from inside
23 the sweat lodge?

24 A. **Probably. I think I --**

25 Q. Probably what?

1 A. **I probably told him that -- what I heard.**

2 Q. And are you able to recall today when it
3 was that you started having memories about what you
4 had heard?

5 A. **The first time was after I left the**
6 **hospital and before the next interview. But every**
7 **time I was talked to, they said if you remember**
8 **anything else, be sure to tell us. And as I was**
9 **questioned further, my memory was jogged further;**
10 **or as I was asked more specific questions about**
11 **specific things, then I answered.**

12 **But when you're just asked basic**
13 **questions, different answers come out than when**
14 **you're asked very specific questions.**

15 Q. That night at the hospital, what was your
16 emotional condition?

17 A. **I would say I was pretty freaked out,**
18 **stressed, shock. I'm not a medical doctor, though.**
19 **So --**

20 Q. When it was it, then, that you told the
21 detective about further conversations you heard
22 from inside Mr. Ray's sweat lodge ceremony?

23 A. **The next day.**

24 Q. And do you recall who it was that you
25 told that to?

1 A. **Detective Diskin.**

2 Q. Do you recall what you told him?

3 A. **I told him that James Ray knew there was**
4 **people unconscious before the last round started**
5 **and he started the round with them in there**
6 **unconscious.**

7 Q. At some -- you testified that you were
8 told by the detective not to discuss your
9 testimony, or you were told by someone not to
10 discuss your testimony with other people.

11 Do you recall when that was?

12 A. **No. I don't recall when that was.**

13 Q. Do you know whether or not it was during
14 the first interview you had with the detective in
15 the hospital?

16 A. **No. It was not then.**

17 Q. Do you recall who it was that told you
18 not to discuss your testimony with other people?

19 A. **I thought it was you.**

20 Q. And when did you first meet me? Did you
21 meet me on October 8?

22 A. **No.**

23 Q. Did you meet me on October 9?

24 A. **No.**

25 Q. Did you meet me on October 19 during your

1 third interview with detectives?

2 A. **No.**

3 Q. You met me sometime much later?

4 A. **Yes. We never did any interviews. We**
5 **were getting hundreds of calls from TV shows and**
6 **reporters, and we didn't talk to anybody but the**
7 **police -- and you were the only people we talked**
8 **to.**

9 Q. When it was you were getting calls from
10 reporters?

11 A. **Beginning the next day. There was, I**
12 **think, 15 messages the next day, and the next day**
13 **15 more. There was quite a few.**

14 Q. Why did you choose not to speak to
15 reporters?

16 A. **Because I didn't want them to just tell a**
17 **portion of my -- I only wanted to be able to tell**
18 **the whole story if I was going to tell anybody**
19 **other than the police anything. And I didn't think**
20 **it was right to do that if there was people being**
21 **charged. I didn't think that was fair to James Ray**
22 **to talk to people when he hasn't even had a chance**
23 **to go on trial yet. I don't think that's right. I**
24 **think the jury needs to decide.**

25 Q. Have you ever talked to reporters?

1 **A. No.**

2 **Q.** In response to a question from Mr. Kelly,
3 you talked about going back to your home after you
4 were allowed to leave the scene on October 8 and
5 how you; your husband, Ted; your daughter, Sarah,
6 and Fawn Foster went back to your house.

7 Do you recall that testimony?

8 **A. Yes.**

9 **Q.** And you made the statement that -- to
10 Mr. Kelly that Sarah doesn't talk about it?

11 **A. Correct.**

12 **Q.** What is it that Sarah doesn't talk about?

13 **A. The incident that occurred, the tragedy**
14 **of her having to assist with dead people.**

15 **Q.** Has Sarah ever talked to you about it?

16 **A. No. Not -- no. I mean, I heard her talk**
17 **to you one time. But she does not talk about it**
18 **that I know of.**

19 **Q.** And did you get counseling for Sarah?

20 **A. No.**

21 **Q.** Does Sarah have -- or do you have a
22 friend who is a counselor?

23 **A. Yes.**

24 **Q.** And who is that?

25 **A. A doctor.**

1 **Q.** Do you know someone named Shawna Bowen?

2 **A. Shawna Bowen? Yes.**

3 **Q.** Do you know if she's a counselor?

4 **A. Yes.**

5 **Q.** Did she come that same day, October 8?

6 **A. She was there. Yes.**

7 **Q.** And is she a friend of Sarah's?

8 **A. Yes. She's a personal friend of ours.**

9 **Q.** Mr. Kelly also played a clip from your
10 interview that occurred on October 19. Do you
11 recall that interview with Detective Diskin then?

12 **A. I didn't get a transcript of that, but**
13 **yes, I do.**

14 **Q.** And the question specifically pertained
15 to Detective Diskin suggesting that you might get a
16 civil attorney. Do you recall that question?

17 **A. Yes.**

18 **Q.** I'm going to hand you Exhibit 677 and
19 direct your attention to page 4.

20 **A. Yes.**

21 **Q.** First of all, would you tell the jury
22 the -- your recollection of the conversations about
23 people being unconscious inside the sweat lodge.

24 Did that come before October 19?

25 **A. Say the question again.**

1 **Q.** Would you tell the jury when it was you
2 told the detective about your conversation -- about
3 overhearing conversations about people being
4 unconscious inside the sweat lodge.

5 **A. The first one was the day after.**

6 **Q.** That was October 9?

7 **A. Yes.**

8 **Q.** And then the question from Mr. Kelly
9 pertaining to the recommendation from
10 Detective Diskin that you consult a civil attorney
11 came on what date?

12 **A. 19th. October 19, 2009.**

13 **Q.** So you had made the -- you had relayed
14 the statements to the detective about what you
15 heard inside the sweat lodge before the suggestion
16 came from Detective Diskin to get a civil attorney?

17 **A. Yes.**

18 MS. POLK: And, Your Honor, this is the
19 portion that the Court ruled I could read to the
20 jury on redirect.

21 THE COURT: Correct.

22 MS. POLK: This would come from Exhibit 677,
23 page 4, lines 5 through 17.

24 **Q.** Do you see where I'm reading from,
25 Ms. Mercer?

1 **A. Yes.**

2 **Q.** And starting on line 5 -- I'm sorry --
3 line 4, Detective Diskin says, I think you should
4 get a civil attorney.

5 And then you respond, yeah. We're
6 actually going to talk to somebody this afternoon.

7 MR. KELLY: Your Honor, excuse me. I'm going
8 to object to the form this is taking place. I
9 believe the witness should read her response.

10 THE COURT: However, as long as it's clear,
11 the question and answer -- it can be done either
12 way as long as it's clear who is asking the
13 question and who is answering.

14 MS. POLK: We'll do that.

15 **Q.** I'll let you read what you said then.

16 **A. Okay.**

17 **Q.** So Detective Diskin says, I think you
18 should get a civil attorney.

19 What did you say?

20 **A. Yes. We're actually going to talk to**
21 **somebody this afternoon. I'm glad you called**
22 **before because I know they're probably going to**
23 **tell me not to.**

24 **Q.** Detective Diskin says, right. Not to.
25 And what did you say?

1 **A. Not to talk to you. But I know -- but --**
 2 **you know -- I just want to paint the best picture I**
 3 **can -- you know -- without -- you know -- I don't**
 4 **want to point the finger. I just want to state the**
 5 **facts.**

6 **Q.** Diskin says, right.

7 And what did you say?

8 **A. And I think the facts are going to point**
 9 **where they do.**

10 **Q.** And Detective Diskin said, and they are
 11 pointing that direction. The problem is -- you
 12 know -- he's got limited defenses for why he
 13 allowed this to happen. And one of them is he's
 14 going to point the finger at you guys and say --
 15 you know -- that you guys didn't build it right or
 16 he thought that you guys were going to vent it
 17 better or something like that.

18 **A. And I say, yeah.**

19 **Q.** Have you ever been aware of Mr. Ray
 20 pointing the finger at you or your husband?

21 **A. No.**

22 **Q.** You were asked some questions by
 23 Mr. Kelly in which he described Mr. Ray's sweat
 24 lodge as a JRI corporate exercise?

25 **A. Yes.**

1 **Q.** Do you know what that means?

2 **A. Not really.**

3 **Q.** You agreed with Mr. Kelly that it was a
 4 JRI corporate exercise?

5 **A. His definition.**

6 **Q.** Did you know anything about a
 7 corporation?

8 **A. I know that James Ray is James Ray**
 9 **International, and I know it's a corporation. And**
 10 **I know -- but I don't know the difference between a**
 11 **corporate exercise or a spiritual exercise. I**
 12 **don't know that I could make that different- --**
 13 **unless -- you know -- it was really obvious. But**
 14 **most of the time, I think, it could go either way.**

15 **Q.** And with regard to the sweat lodge
 16 ceremonies facilitated by Mr. Ray, was there
 17 anything about those ceremonies that would cause
 18 you to conclude somehow it was a corporate
 19 exercise?

20 **A. No. Just that it was James Ray**
 21 **International conducting it, and most of the other**
 22 **events that came were not an international**
 23 **corporation. So in his definition of "corporate,"**
 24 **that's what I assumed to be corporate exercise,**
 25 **meaning it was a corporate entity, not just**

1 **somebody else.**

2 **Q.** You told Mr. Kelly that you were not
 3 surprised that participants in Mr. Ray's events
 4 wanted the challenge of the extreme nature of the
 5 event.

6 Do you recall that?

7 **A. Yes.**

8 **Q.** And why were you not surprised?

9 **A. I guess I -- can you rephrase the**
 10 **question?**

11 **Q.** You -- in response to a question from
 12 Mr. Kelly, he said to you, it would not surprise
 13 you that participants of Mr. Ray's sweat lodge
 14 events wanted the challenge of the extreme nature
 15 of the event.

16 Do you remember that question?

17 **A. Yes. I don't know that I would know -- I**
 18 **mean --**

19 **Q.** Do you recall why you agreed with
 20 Mr. Kelly when he said you were not surprised?

21 **A. Yes.**

22 **Q.** And why did you?

23 **A. The flow and just to go along because**
 24 **he -- I feel like I get defensive and**
 25 **argumentative. And I don't want to make that**

1 **appearance. I really just want to answer the**
 2 **questions the best I can.**

3 **Q.** Mr. Kelly questioned you about -- he used
 4 the term "words of encouragement used by Mr. Ray"
 5 with respect to getting people to stay inside the
 6 sweat lodge ceremony.

7 **A. Yes.**

8 **Q.** And you said -- and he said, such as
 9 you're more than that. Your response was, I don't
 10 consider those to be words of encouragement.

11 Why not?

12 **A. Because I don't think ignoring your body**
 13 **and what your body is telling you to do is good**
 14 **advice.**

15 **Q.** What did you hear or observe from
 16 Mr. Ray's sweat lodge ceremonies that caused you to
 17 say words encouraging you to ignore your body? Did
 18 that question make sense?

19 **A. No. I mean, I don't know how to answer.**

20 MR. KELLY: Your Honor, I'm going to object to
 21 the form of the question. I don't think I
 22 understood it.

23 THE COURT: Sustained.

24 **Q.** BY MS. POLK: Did you ever hear Mr. Ray
 25 tell participants to ignore their body?

1 **A. Yes.**
 2 **Q.** Tell the jury what you heard.
 3 **A. You are not your body. You are more than**
 4 **that. You are above your body. It's a good day to**
 5 **die.**
 6 **I mean, that's not listening to your body**
 7 **if you're saying it's okay to die. And -- yeah.**
 8 **You're more than that. You are not your body. I**
 9 **heard him say those words exactly. You are not**
 10 **your body.**
 11 **Q.** You were asked some questions about Laura
 12 Tucker. Do you know a person named Laura Tucker?
 13 **A. No, I don't.**
 14 **Q.** And specifically Mr. Kelly asked you
 15 whether or not you heard Laura Tucker give words of
 16 encouragement to Liz Neuman?
 17 **A. Yes.**
 18 **Q.** Do you know where Liz Neuman was seated
 19 inside Mr. Ray's sweat lodge ceremony?
 20 **A. No, I don't.**
 21 **Q.** I'm going to put up on the overhead
 22 Exhibit 414. And I want to ask you about the words
 23 that you heard around the middle of the sweat
 24 lodge. You had testified that came from this area
 25 over here?

1 **A. Yes.**
 2 **Q.** Do you know who was speaking? First of
 3 all, remind the jury what you heard.
 4 **A. I heard a male voice say that a person --**
 5 **they said their name, but I don't remember the**
 6 **name -- wasn't doing so good.**
 7 **And he said really? Is she unconscious?**
 8 **And the person said I can't get her to**
 9 **react. She's not moving. I can't get her to react**
 10 **or respond.**
 11 **Q.** And was the door open or closed when you
 12 heard that?
 13 **A. Open.**
 14 **Q.** And did you hear Mr. Ray respond?
 15 **A. Yes.**
 16 **Q.** And what did he say?
 17 **A. He said she's been down this road before.**
 18 **She knows what she's doing. She'll be okay.**
 19 **Q.** Did you hear anybody else from inside the
 20 sweat lodge say anything further pertaining to that
 21 situation?
 22 **A. I remember a conversation about taking**
 23 **care of yourself, worry about yourself, at that**
 24 **same time.**
 25 **Q.** Did you hear any words of encouragement

1 come from this area after you heard Mr. Ray
 2 respond?
 3 **A. No.**
 4 **Q.** You were asked about the vegetarian diet
 5 and whether or not it would affect the mental
 6 status of participants.
 7 **A. Yes.**
 8 **Q.** Do you know whether Mr. Ray himself made
 9 any comments to the participants about the effect
 10 of the vegetarian diet?
 11 **A. No, I don't.**
 12 **Q.** You never heard any?
 13 **A. No.**
 14 **Q.** You responded also that one other group
 15 had done a Vision Quest that you were aware of?
 16 **A. Yes. It was a corporate group, a**
 17 **corporate retreat.**
 18 **Q.** And do you know if that group did a sweat
 19 lodge ceremony also?
 20 **A. I'm not certain. I'm not certain.**
 21 **Q.** Do you recall when it was that another
 22 group did a Vision Quest?
 23 **A. Well, the same group came back twice.**
 24 **They were there once in 2008, and then they were**
 25 **there again in 2009 when I wasn't working there.**

1 **But I saw people there, so I knew what they were**
 2 **doing in different spots.**
 3 **Q.** And on both of those occasions do you
 4 know whether or not for their Vision Quest they
 5 abstained from food and water?
 6 **A. They had water. I don't know about food,**
 7 **but I saw water with them.**
 8 **Q.** You referenced a memo from Gary Palisch.
 9 Do you recall that testimony?
 10 **A. Yes.**
 11 **Q.** I want to show you Exhibit 793 and ask
 12 you, first of all, just to take a look at it.
 13 **A. Yes.**
 14 **Q.** Do you recognize it?
 15 **A. Yes.**
 16 **Q.** And what do you recognize it to be?
 17 **A. To be the email that I received to**
 18 **explain how to set up the blankets and stuff on the**
 19 **sweat lodge.**
 20 MS. POLK: Your Honor, I move for the
 21 admission of Exhibit 793.
 22 MR. KELLY: Judge, no objection.
 23 THE COURT: 793 is admitted.
 24 (Exhibit 793 admitted.)
 25 **Q.** BY MS. POLK: Who did you receive this

1 memo from?

2 **A. It says, from Gary Palisch.**

3 **Q.** And who did it go to?

4 **A. Michael Hamilton.**

5 **Q.** How was it given to you?

6 **A. In an email. It was sent as an email. I**
7 **don't know who actually sent it. But I received it**
8 **as an email.**

9 **Q.** Do you recall when you got it?

10 **A. I think it was the day we were going up**
11 **there. We got called at the last minute and asked**
12 **him to help with this. We weren't planning on it.**

13 **Q.** Now, what year are you talking about?

14 **A. 2007.**

15 **Q.** Let me -- I'll put it up on the overhead.

16 This memo is dated September 26 of 2007?

17 **A. Yes.**

18 **Q.** Do you recall whether or not you had
19 participated in putting together any sweat lodges
20 before receiving this memo?

21 **A. I had not. Oh. No. I had not.**

22 **Q.** And in what context was it that you were
23 given this memo?

24 **A. We were asked to come up and help with**
25 **the sweat lodge.**

1 **Q.** Who was there for the first time you
2 helped put together a sweat lodge?

3 **A. We put it -- we put the blankets on by**
4 **ourselves. This was our directions.**

5 **Q.** You followed the direction that's set out
6 in this memorandum?

7 **A. Yes. There was no one there. That's why**
8 **we had written directions.**

9 **Q.** For the subsequent sweat lodges that you
10 helped put together, did you always follow what's
11 set forth in this memorandum?

12 **A. Yes.**

13 **Q.** And specifically for the order that the
14 coverings went on the sweat lodges, did you follow
15 what's set forth in this memorandum?

16 **A. Yes. With the addition of the big brown**
17 **thing that we found out after this sweat lodge.**

18 **Q.** And, specifically, every time you put
19 together a sweat lodge, whether it was for Mr. Ray
20 or some other facilitator, in what order did you
21 put on the coverings?

22 **A. Blankets and quilts, then the tarps, then**
23 **the plastic.**

24 **Q.** And I note in this memorandum that if you
25 look down to the fourth bullet point, it says, have

1 three five-gallon buckets at lodge for water for
2 lodge pourer?

3 **A. Yes.**

4 **Q.** Yet in 2009 we see that you had four
5 buckets?

6 **A. Yes.**

7 **Q.** Do you know when it was that you
8 increased the number of buckets?

9 **A. No.**

10 **Q.** And do you know why you increased the
11 number of buckets?

12 **A. Because he --**

13 MR. KELLY: Your Honor, objection. Lack of
14 foundation.

15 THE COURT: It's a yes or no. If you can
16 answer that, you may.

17 THE WITNESS: Yes.

18 **Q.** BY MS. POLK: And why?

19 MR. KELLY: Your Honor, objection. May I voir
20 dire the witness?

21 THE COURT: Okay.

22 VOIR DIRE EXAMINATION

23 BY MR. KELLY:

24 **Q.** Ms. Mercer, did you ever have a
25 conversation with my client about -- Mr. Ray about

1 how many buckets?

2 **A. No.**

3 MR. KELLY: Your Honor, object.

4 THE COURT: Ms. Polk.

5 MS. POLK: Your Honor, this is --

6 THE COURT: Overruled.

7 You may answer the question.

8 THE WITNESS: What was the question?

9 REDIRECT EXAMINATION (Continued)

10 BY MS. POLK:

11 **Q.** Why did you go from -- the memo tells you
12 have three buckets ready?

13 **A. Yes.**

14 **Q.** And for Mr. Ray's 2009 ceremony, you had
15 four buckets ready?

16 **A. Yes.**

17 **Q.** Do you recall why? That's yes or no. Do
18 you recall why?

19 **A. No.**

20 **Q.** Do you recall when it was that you
21 increased the number of buckets?

22 **A. No.**

23 **Q.** What do you recall?

24 **A. I recall that it took a long time to fill**
25 **the buckets of water up. So I remember thinking we**

1 **should have another -- more buckets there so it**
 2 **wouldn't take so much time to fill them up, to**
 3 **bring them in, because he required several buckets**
 4 **of water.**

5 Q. He being whom?

6 A. **James Ray.**

7 Q. The sweat lodge that was used in 2007,
 8 the frame itself --

9 A. **Yes.**

10 Q. Was that different than the frame
 11 for 2008?

12 A. **Yes.**

13 Q. And there was some confusion when you
 14 testified about the construction of the sweat
 15 lodge.

16 A. **Yes.**

17 Q. Do you recall that?

18 A. **Yes.**

19 Q. In 2007 when you helped put together a
 20 sweat lodge, was the frame already in place?

21 A. **Yes.**

22 Q. And that was the case for several
 23 ceremonies that followed?

24 A. **Yes.**

25 Q. Until when?

1 A. **Until they told us James Ray needed --**
 2 **wanted a bigger kiva. So it was taken down, and**
 3 **then the bigger one was build.**

4 Q. And that was the one in 2008?

5 A. **Yes.**

6 Q. And who was in charge of building the
 7 kiva for 2008? Were you in charge?

8 A. **No.**

9 Q. Was your husband in charge?

10 A. **No.**

11 Q. Do you recall who was in charge?

12 A. **Angel Valley hired some people. There**
 13 **was two or three people that were there. But I**
 14 **never -- I don't know who it was. I mean, I don't**
 15 **remember that guy's name.**

16 Q. And Mr. Kelly asked you some questions
 17 about you doing research on the internet on how to
 18 build a sweat lodge.

19 Do you recall those questions?

20 A. **Yes.**

21 Q. Did you at some point do research on the
 22 internet on building sweat lodges?

23 A. **Not on building the kiva. I went on line**
 24 **to verify that the directions that I received in**
 25 **the emails was the way you should do it.**

1 Q. When did you do that?

2 A. **I don't know exactly. But it was close**
 3 **to the time that I got this email.**

4 Q. And what did you learn when you did that
 5 research?

6 A. **The research -- the website that I found**
 7 **had the basic same directions. It was, basically,**
 8 **the same thing, the same directions.**

9 Q. Did that include using tarps?

10 A. **Yes. All the way to the ground with**
 11 **rocks. Yes.**

12 Q. And after you did your research, did that
 13 make -- what did that do for your comfort level?

14 A. **It made me know that that's the way it**
 15 **was supposed -- that it was supposed to be**
 16 **constructed, that the layers -- that that was**
 17 **right.**

18 THE COURT: Ms. Polk, it is 5:00 o'clock.

19 Ladies and gentlemen, we will take the
 20 evening recess. Of course, remember the
 21 admonition.

22 Ms. Mercer, please remember that rule of
 23 exclusion.

24 I'm going to ask the parties to remain
 25 just a moment.

1 The witness and the jury are excused at
 2 this time.

3 And 9:15 tomorrow.

4 (Proceedings continued outside presence
 5 of jury.)

6 THE COURT: I'll note that the jury has left.
 7 The witness has exited. I just wanted to talk
 8 about exhibits a moment.

9 Is that taken care of?

10 THE CLERK: I received 895.

11 THE COURT: I wanted to make sure that got
 12 squared away with the exhibit.

13 MR. KELLY: It has, Judge.

14 THE COURT: Okay. There is something I've
 15 been meaning to do. Back whether the motion for
 16 mistrial was argued, Mr. Li presented me with
 17 several matters I considered. I wanted to make
 18 them of record as exhibits. I'd like to make sure
 19 that these -- I'm sure this is what was given to
 20 me. But they really should be on record.

21 Show that to Ms. Polk as well or
 22 Mr. Hughes.

23 I just want to make the record very
 24 clear. What numbers will those be?

25 THE CLERK: 896 will be the next number.

1 THE COURT: Just to complete the record on
2 that, the next three numbers -- 896 -97 and -98.
3 And these are not trial exhibits. They're admitted
4 solely for the proceedings on 413, for no other
5 purpose.

6 (Exhibits 896 through 898 admitted.)

7 THE COURT: Ms. Rybar informed me, I guess,
8 that one or more of the jurors have been inquiring
9 about Friday and the weekend. And I was going to
10 suggest that trial be concluded by 4:00 on Friday
11 in light of those inquiries.

12 Counsel, anything else this afternoon?

13 Ms. Polk?

14 MS. POLK: Your Honor, just the issue of
15 playing the clips and having a record of them.

16 THE COURT: Right.

17 MS. POLK: There has been a number of clips
18 played. And I didn't realize until today that the
19 exhibit number encompasses far more than the clip
20 that's being played. And so going back in time, I
21 would just ask that for every clip that was played,
22 that it be given a separate exhibit number so
23 that -- because the court reporter doesn't take
24 down what's being played.

25 THE COURT: And that's what I thought I was

1 addressing. I think that's a good idea. I did try
2 to get the -- a correlation to transcript numbers
3 on record.

4 Mr. Li.

5 MR. LI: Your Honor, we're happy to do that.
6 But, for the record, I think when I've been doing
7 it, I've given the time stamp of the particular --
8 from the exhibit. If it's 10 minutes and 31
9 seconds to 11 minutes and 12 seconds, that sort of
10 thing.

11 For instance, I know for a fact that with
12 Ms. Gennari, where I used some of the clips, I
13 would describe it with a time stamp. We don't care
14 how we do it, but that would also be accurate as
15 far as the -- it might be Exhibit 630, time stamp
16 10 minutes and 12 seconds to 10 minutes and 15
17 seconds.

18 THE COURT: I just ask that you talk to each
19 other about that. And however you want to do it,
20 the time stamp, if that's acceptable, that's fine.
21 I just want to get it on the record.

22 MR. LI: We put them on clips just so it's
23 easier, but we used the time stamp to make the
24 clips.

25 MR. KELLY: Judge, today each and every clip

1 that was used, 1 through 6, is on one exhibit
2 marked for identification as 895 but identified as
3 clips 1, 2, 3. And they were referenced by clip
4 number and exhibit number.

5 THE COURT: Ms. Polk, I just want to make sure
6 the parties agree that there is an accurate record
7 of the exact excerpts played in court.

8 MS. POLK: Your Honor, I agree. If it can be
9 by reference to a time stamp, that would be fine as
10 well. I'm not sure what's on the exhibits
11 themselves and whether or not they are identified
12 by clip on the exhibits themselves. We can talk to
13 counsel and work it out.

14 THE COURT: Okay. Thank you. We are in
15 recess.

16 (The proceedings concluded.)
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1 STATE OF ARIZONA)
2 COUNTY OF YAVAPAI) ss REPORTER'S CERTIFICATE

3
4 I, Mina G Hunt, do hereby certify that I
5 am a Certified Reporter within the State of Arizona
6 and Certified Shorthand Reporter in California

7 I further certify that these proceedings
8 were taken in shorthand by me at the time and place
9 herein set forth, and were thereafter reduced to
10 typewritten form, and that the foregoing
11 constitutes a true and correct transcript

12 I further certify that I am not related
13 to, employed by, nor of counsel for any of the
14 parties or attorneys herein, nor otherwise
15 interested in the result of the within action

16 In witness whereof, I have affixed my
17 signature this 27th day of April, 2011
18
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23 -----
24 MINA G HUNT, AZ CR No 50619
25 CA CSR No 8335

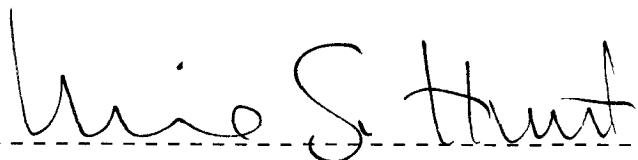
1 STATE OF ARIZONA)
2) ss: REPORTER'S CERTIFICATE
3 COUNTY OF YAVAPAI)
4

5 I, Mina G. Hunt, do hereby certify that I
6 am a Certified Reporter within the State of Arizona
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